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United Nations

Report of the International Law Commission

Fifty-sixth session
(3 May-4 June and 5 July-6 August 2004)

General Assembly
Official Records
Fifty-ninth session
Supplement No. 10 (A/59/10)

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Note

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2004*.

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CHAPTER I

Introduction

1. The International Law Commission held the first part of its fifty-sixth session from 3 May to 4 June 2004 and the second part from 5 July to 6 August 2004 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Enrique Candioti, Chairman of the Commission at its fifty-fifth session.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain M. Al-Baharna (Bahrain)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique Candioti (Argentina)
Mr. Choung Il Chee (Republic of Korea)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Riad Daoudi (Syrian Arab Republic)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Fathi Kemicha (Tunisia)
Mr. Roman Anatolyevitch Kolodkin (Russian Federation)
Mr. Martti Koskenniemi (Finland)

Mr. William R. Mansfield (New Zealand)
Mr. Michael J. Matheson (United States)
Mr. Theodor Viorel Melescanu (Romania)
Mr. Djamchid Momtaz (Islamic Republic of Iran)
Mr. Bernd H. Niehaus (Costa Rica)
Mr. Didier Opertti Badan (Uruguay)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Victor Rodríguez Cedeño (Venezuela)
Mr. Bernardo Sepulveda (Mexico)
Ms. Hanqin Xue (China)
Mr. Chusei Yamada (Japan)

B. Officers and Enlarged Bureau

3. At its 2791st meeting, held on 3 May 2004, the Commission elected the following officers:

Chairman:	Mr. Teodor Viorel Melescanu
First Vice-Chairperson:	Ms. Hanqin Xue
Second Vice-Chairman:	Mr. Constantin P. Economides
Chairman of the Drafting Committee:	Mr. Victor Rodríguez Cedeño
Rapporteur:	Mr. Pedro Comissário Afonso

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

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[1] Mr. J.C. Baena Soares, Mr. E. Candioti, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. A. Pellet, Mr. P.S. Rao and Mr. C. Yamada.

[2] Mr. C.J.R. Dugard, Mr. G. Gaja, Mr. A. Pellet, Mr. P.S. Rao, Mr. V. Rodríguez Cedeño and Mr. C. Yamada.

5. On the recommendation of the Enlarged Bureau the Commission set up a Planning Group composed of the following members: Ms. H. Xue (Chairperson), Mr. I. Brownlie, Mr. E. Candioti, Mr. C.I. Chee, Mr. C.J.R. Dugard, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. J.L. Kateka, Mr. F. Kemicha, Mr. R.A. Kolodkin, Mr. M. Koskenniemi, Mr. W.R. Mansfield, Mr. M.J. Matheson, Mr. T.V. Melescanu, Mr. B.H. Niehaus, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. P.S. Rao, Mr. V. Rodríguez Cedeño, Mr. B. Sepulveda, Mr. C. Yamada and Mr. P. Comissário Afonso (ex-officio).

C. Drafting Committee

6. At its 2792nd, 2803rd, 2808th and 2815th meetings, held on 4 and 25 May, 2 June and 9 July 2004, respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Diplomatic protection: Mr. V. Rodríguez Cedeño (Chairman), Mr. C.J.R. Dugard (Special Rapporteur), Mr. E.A. Addo, Mr. I. Brownlie, Mr. E. Candioti, Mr. C.I. Chee, Ms. P. Escarameia, Mr. G. Gaja, Mr. P.C.R. Kabatsi, Mr. R.A. Kolodkin, Mr. W.R. Mansfield, Mr. M.J. Matheson, Mr. B.H. Niehaus, Mr. B. Sepulveda, Ms. H. Xue and Mr. P. Comissário Afonso (ex-officio);

(b) Responsibility of international organizations: Mr. V. Rodriguez Cedeño (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. E. Candioti, Mr. C.I. Chee, Mr. C.P. Economides, Ms. P. Escarameia, Mr. P.C.R. Kabatsi, Mr. R.A. Kolodkin, Mr. M. Koskenniemi, Mr. W.R. Mansfield, Mr. D. Momtaz, Mr. B.H. Niehaus, Mr. C. Yamada and Mr. P. Comissário Afonso (ex-officio);

(c) Reservations to treaties: Mr. V. Rodríguez Cedeño (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. H.M. Al-Baharna, Mr. E. Candioti, Mr. C.P. Economides, Mr. S. Fomba, Mr. G. Gaja, Mr. R.A. Kolodkin, Mr. M.J. Matheson, Mr. G. Pambou-Tchivounda and Mr. P. Comissário Afonso (ex-officio);

(d) International liability: Mr. V. Rodríguez Cedeño (Chairman), Mr. P.S. Rao (Special Rapporteur), Mr. I. Brownlie, Mr. C.I. Chee, Mr. R. Daoudi, Mr. C.P. Economides, Mr. G. Gaja, Mr. Z. Galicki, Mr. J.L. Kateka, Mr. R.A. Kolodkin, Mr. M. Koskenniemi, Mr. W.R. Mansfield, Mr. M.J. Matheson, Mr. D. Momtaz, Ms. H. Xue, Mr. C. Yamada and Mr. P. Comissário Afonso (ex-officio).

7. The Drafting Committee held a total of 17 meetings on the four topics indicated above.

D. Working Groups

8. At its 2796th, 2797th, 2809th and 2818th meetings, held on 11 and 12 May, 3 June and 16 July 2004, respectively, the Commission also established the following Working Groups and Study Group, which were open to all members:

(a) Study Group on Fragmentation of international law: Difficulties arising from the diversification and expansion of international law

Chairman: Mr. M. Koskenniemi

(b) Working Group on Shared Natural Resources

Chairman: Mr. C. Yamada

(c) Working Group on International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

Chairman: Mr. P.S. Rao

(d) Working Group on Unilateral acts of States

Chairman: Mr. A. Pellet

9. The Working Group on long-term programme of work reconvened and was composed of the following members: Mr. A. Pellet (Chairman), Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. M. Kamto, Mr. M. Koskenniemi, Ms. H. Xue and Mr. P. Comissário Afonso (ex-officio).

E. Secretariat

10. Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs, the Acting Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Acting Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Senior Legal Officer served as Senior Assistant Secretary, Mr. Trevor Chimimba, Mr. Renan Villacis and Mr. Arnold Pronto, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

11. At its 2791st meeting, held on 3 May 2004, the Commission adopted an agenda for its fifty-sixth session consisting of the following items:

1. Organization of work of the session.
2. Responsibility of international organizations.
3. Diplomatic protection.
4. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities).
5. Unilateral acts of States.
6. Reservations to treaties.
7. Shared natural resources.
8. Fragmentation of international law: Difficulties arising from the diversification and expansion of international law.
9. Programme, procedures and working methods of the Commission and its documentation.
10. Cooperation with other bodies.
11. Date and place of the fifty-seventh session.
12. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-SIXTH SESSION

12. As regards the topic "Diplomatic protection", the Commission considered the Special Rapporteur's fifth report (A/CN.4/538) dealing with the relationship between diplomatic protection and functional protection by international organizations, diplomatic protection and human rights, and diplomatic protection and protection of ships' crews by the flag State. The Commission referred draft article 26 and a reformulation of draft article 21 to the Drafting Committee. The Commission also requested that the Drafting Committee consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection. The Commission adopted on first reading a set of 19 draft articles on diplomatic protection and decided, in accordance with articles 16 and 21 of its Statute to transmit the draft articles to Governments for comments. The Commission also requested the Special Rapporteur to consider the possible relationship between the clean hands doctrine and diplomatic protection. The Special Rapporteur prepared and submitted a memorandum on this subject, but the Commission decided, due to the lack of time, to consider it at its next session (Chap. IV).

13. With regard to the topic of "Responsibility of international organizations", the Commission considered the Special Rapporteur's second report (A/CN.4/541) dealing with attribution of conduct to international organizations. The report proposed four draft articles which were considered by the Commission and referred to the Drafting Committee. The Commission adopted the four draft articles (draft articles 4 to 7) as recommended by the Drafting Committee together with commentaries (Chap. V).

14. As regards the topic "Shared Natural Resources", the Commission considered the second report of the Special Rapporteur (A/CN.4/539 and Add.1) which contained seven draft articles. The Commission also established an open-ended Working Group on Transboundary Groundwaters chaired by the Special Rapporteur, and held two informal briefings by experts on groundwater from the Economic Commission for Europe, UNESCO, FAO and the International Association of Hydrogeologists (IAH) (Chap. VI).

15. Concerning the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities)", the Commission considered the Special Rapporteur's second report (A/CN.4/540). It established a Working Group to examine the proposals submitted by the Special Rapporteur. It referred eight draft principles submitted by the Working Group to the Drafting Committee, and adopted on first reading a set of draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities, together with commentaries (Chap. VII).

16. As regards the topic "Unilateral Acts of States", the Commission considered the seventh report of the Special Rapporteur (A/CN.4/542 and Corr.1 (French only) Corr.2 and Corr.3), which contained a survey of State practice in respect of unilateral acts. A Working Group on Unilateral Acts was reconstituted and its work focused on the detailed consideration of specific examples of unilateral acts (Chap. VIII).

17. Concerning the topic "Reservations to Treaties", the Commission adopted five draft guidelines dealing with widening of the scope of a reservation, modification and withdrawal of interpretative declarations. The Commission also considered the Special Rapporteur's ninth report (A/CN.4/544) and referred two draft guidelines dealing with the "definition of objections to reservations", as well as "objection to late formulation or widening of the scope of a reservation", to the Drafting Committee (Chap. IX).

18. In relation to the topic "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", the Study Group of the Commission considered the Preliminary report on the Study on the Function and Scope of the *lex specialis* rule and the question of self-contained regimes, as well as outlines on the Study on the Application of Successive Treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); on the Study concerning the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); on the Study on the Interpretation of Treaties in the light of "any relevant rules of international law applicable in relations between parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties); and the Study on Hierarchy in International Law: *jus cogens,* obligations *erga omnes,* Article 103 of the Charter of the United Nations, as conflict rules (Chap. X).

19. The Commission set up the Planning Group to consider its programme, procedures and working methods (chap. XI, sect. A). On the recommendation of the Planning Group, the Commission decided to include in its current programme of work two new topics, namely "Expulsion of aliens" and "Effects of armed conflicts on treaties". In this regard, the Commission decided to appoint Mr. Maurice Kamto, Special Rapporteur for the topic "Expulsion of aliens" and Mr. Ian Brownlie, Special Rapporteur for the topic "Effects of armed conflicts on treaties". The Commission also agreed with the recommendation of the Planning Group to include the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in its long-term programme of work. The Commission envisages the inclusion of this topic in its current programme of work as of its next session.

20. The Commission continued traditional exchanges of information with the International Court of Justice, the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (Chap. XI, sect. C).

21. A training seminar was held with 24 participants of different nationalities (Chap. XI, sect. E).

22. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 2 May to 3 June and from 4 July to 5 August 2005 (Chap. XI, sect. B).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

A. Diplomatic protection

23. The Commission would welcome comments and observations from Governments on all aspects of the draft articles on diplomatic protection adopted on first reading.

24. The Commission would also welcome comments and observations from Governments on the commentaries to the draft articles.

B. Responsibility of international organizations

25. In 2003 the Commission adopted three draft articles concerning general principles relating to the responsibility of international organizations and in 2004 four draft articles on attribution of conduct. In so doing, the Commission has followed the general scheme of the articles on responsibility of States for internationally wrongful acts. Broadly continuing with the same scheme, the Special Rapporteur intends to address in his third report, which is due in 2005, the following topics: breach of an international obligation; circumstances precluding wrongfulness; responsibility of an international organization in connection with the wrongful act of a State or another organization. For this purpose, views expressed on the following questions would be particularly helpful:

(a) Relations between an international organization and its member States and between an international organization and its agents are mostly governed by the rules of the organization, which are defined in draft article 4, paragraph 4, as comprising "in particular: the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization". The legal nature of the rules of the organization in relation to international law is controversial. It is at any event debatable to what extent the Commission should, in its study of responsibility of international organizations under international law, consider breaches of obligations that an international organization may have towards its member States or its agents. What scope should the Commission give to its study in this regard?

(b) Among the circumstances precluding wrongfulness, article 25 on Responsibility of States for internationally wrongful acts refers to "necessity", which may be invoked by a State under certain conditions: first of all, that the "act not in conformity with an international obligation of that State [...] is the only way for the State to safeguard an essential interest against a grave and imminent peril". Could necessity be invoked by an international organization under a similar set of circumstances?

(c) In the event that a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, would the organization also be regarded as responsible under international law? Would the answer be the same if the State's wrongful conduct was not requested, but only authorized, by the organization?

C. Shared natural resources

26. Under this topic, the Commission is now focusing for the time being on the question of transboundary groundwaters.

27. Next year, the Special Rapporteur aims to submit his third report, including a full set of draft articles on the law of transboundary aquifer systems on the basis of the general framework that he proposed in his second report, which is reproduced in the footnote to paragraph 86 in Chapter VI of this report. The Commission would welcome the views of Governments on this general framework.

28. The Commission would also welcome detailed and precise information which Governments can provide on their practice that may be relevant to the principles to be incorporated in the draft articles, in particular:

(a) Practice, bilateral or regional, relating to the allocation of groundwaters from transboundary aquifer systems; and

(b) Practice, bilateral or regional, relating to the management of non-renewable transboundary aquifer systems.

D. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in the case of loss from transboundary harm arising out of hazardous activities)

29. The Commission would welcome comments and observations from Governments on all aspects of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted on first reading. In particular, the Commission would welcome comments and observations on the final form.

30. The Commission would also welcome comments and observations from Governments on the commentaries to the draft principles. The Commission notes that the commentaries are organized as containing an explanation of the scope and context of each draft principle as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the elaboration of specific international regimes.

E. Unilateral acts of States

31. In general, the Commission took the view that the study of practice which began this year should also cover the evolution and lifespan of unilateral acts of States. In particular, it considered that more detailed attention should be paid to various related aspects, such as: the date, author/organ and its competence, form, content, context and circumstances, objectives, addressees, reaction of addressee(s) and third parties, grounds, implementation, modification, termination/revocation, legal scope and court decisions and arbitral awards adopted in relation to unilateral acts. It might thus be possible to determine whether there are general rules and principles that might be applicable to the operation of such acts.

32. The Commission would like to receive comments from States on their practice in this regard, in the light of the elements referred to above, which will be duly taken into account by the Special Rapporteur in his next report on the topic, together with the practical examples that some members of the Commission will make available to him, as agreed in the Working Group established this year.

F. Reservations to treaties

33. The Special Rapporteur intends to deal with the question of the "validity" of reservations in his report next year.

34. The Vienna Conventions on the law of treaties deal with cases in which a State or an international organization "cannot" formulate a reservation (art. 19), but they do not contain an adjective qualifying a reservation which might nevertheless be made in one of those cases. The terms used by States in practice are not at all uniform in that regard.

35. Both in the International Law Commission and in the Sixth Committee, there were disagreements and lengthy discussions on the terminology to be used in that regard. It was pointed out, for example, that the word "lawfulness" had the disadvantage of referring to the law of State responsibility, although the Commission has not yet examined the question whether a reservation that was prohibited or improperly formulated would entail its author's responsibility. Moreover, a choice must not only be made between the words "admissibility" and "permissibility", but their equivalent in French ("*recevabilité*") is not satisfactory. The term "validity", which the Special Rapporteur found neutral and sufficiently comprehensible and which offered the advantage of having an equivalent in all of the Commission's working languages, was criticized on the grounds that it created confusion between the nullity of a reservation and its opposability.[3]

36. In 2002, the Commission "decided to leave the matter open until it had adopted a final position on the effect" of reservations covered by the provisions of article 19 of the Vienna Conventions.[4]

37. Before adopting a final position, the Commission would welcome comments and observations of Governments on this question.

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[3] See the preliminary report on the law and practice relating to reservations to treaties, A/CN.4/470, paras. 97 et seq.

[4] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), commentary to draft guideline 2.1.8 [2.1.7 bis], para. (7)).

CHAPTER IV

DIPLOMATIC PROTECTION

A. Introduction

38. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[5] In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[6] The Working Group submitted a report at the same session which was endorsed by the Commission.[7] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[8]

39. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

40. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

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[5] Ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and annex II, addendum 1.

[6] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[7] Ibid., para. 171.

[8] Ibid., paras. 189-190.

41. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[9] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[10]

42. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic,[11] after Mr. Bennouna was elected a judge to the International Criminal Tribunal for the former Yugoslavia.

43. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[12] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

44. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)). Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12

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[9] A/CN.4/484.

[10] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 108.

[11] Ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 19.

[12] The report of the informal consultations is contained in ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

and 13, to the next session. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

45. At its 2688th meeting, the Commission established an open-ended Informal Consultation on article 9, chaired by the Special Rapporteur.

46. At its fifty-fourth session, in 2002, the Commission had before it the remainder of the second report of the Special Rapporteur (A/CN.4/514 and Corr.1 and 2 (Spanish only)), concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1), covering draft articles 14 to 16. The Commission decided to refer draft article 14, paragraphs (a), (b), (d) (to be considered in connection with paragraph (a)), and (e) to the Drafting Committee at its 2719th meeting, held on 14 May 2002. It further decided, at its 2729th meeting, held on 4 June 2002, to refer draft article 14, paragraph (c) to the Drafting Committee to be considered in connection with paragraph (a).

47. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8], at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and 6 at its 2732nd meeting. At its 2745th and 2746th meetings, held on 12 and 13 August 2002, the Commission adopted the commentaries to the aforementioned draft articles.

48. At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

49. At its fifty-fifth session, in 2003, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/530 and Corr.1 (Spanish only) and Add.1). The Commission considered the first part of the report, concerning draft articles 17 to 20, at its 2757th to 2762nd, 2764th and 2768th meetings, held from 14 May to 23 May, 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, held on 15, 16 and 18 July 2003.

50. At its 2762nd meeting, held on 23 May 2003, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, on article 17, paragraph 2.[13] The Commission considered the report of the Working Group at its 2764th meeting, held on 28 May 2003.

51. The Commission decided, at its 2764th meeting, to refer to the Drafting Committee article 17, as proposed by the Working Group,[14] and articles 18, 19 and 20. It subsequently further decided, at its 2777th meeting, to refer articles 21 and 22 to the Drafting Committee.

52. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting, held on 5 June 2003. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.

B. Consideration of the topic at the present session

53. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/538). The Commission considered the report at its 2791st to 2796th meetings, held from 3 to 11 May 2004.

54. During the consideration of the fifth report, the Commission requested the Special Rapporteur to consider whether the doctrine of clean hands is relevant to the topic of Diplomatic protection and if so whether it should be reflected in the form of an article. The Special Rapporteur prepared a memorandum on this issue (ILC(LVI)/DP/CRP.1), but the Commission did not have time to consider it and decided to come back to this question at the next session.

55. At its 2794th meeting, held on 6 May 2004, the Commission decided to refer draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur, to the Drafting Committee. The Commission further decided, at its 2796th meeting, held on 11 May 2004, that the Drafting Committee consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection.

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[13] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 90-92.

[14] Ibid., para. 92.

56. The Commission considered the report of the Drafting Committee at its 2806th meeting, held on 28 May 2004, and adopted on first reading a set of 19 draft articles on diplomatic protection (see section C below).

57. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

58. At its 2827th meeting, held on 3 August 2004, the Commission expressed its deep appreciation for the outstanding contribution the two Special Rapporteurs, Messrs. Mohamed Bennouna and John Dugard, had made to the treatment of the topic through their scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on diplomatic protection.

C. Text of the draft articles on diplomatic protection adopted by the Commission on first reading

1. Text of the draft articles

59. The text of the draft articles adopted by the Commission on first reading is reproduced below.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Article 5

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim

but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

Article 11

Protection of shareholders

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(*a*) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(*b*) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13

Other legal persons

The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 16, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Article 15

Category of claims

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 16

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(*d*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 17

Actions or procedures other than diplomatic protection

The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

Article 18

Special treaty provisions

The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

Article 19

Ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

2. Text of the draft articles with commentaries thereto

60. The texts of the draft articles on diplomatic protection with commentaries thereto adopted on first reading by the Commission at its fifty-sixth session, are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961. The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that

the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.[15] Nevertheless, there is a close connection between the draft articles on State Responsibility and the present draft articles. Many of the principles contained in the draft articles on State Responsibility are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the draft articles on State Responsibility. Some members of the Commission were of the view that the legal consequences of diplomatic protection should have been covered in the present draft articles and that the focus of attention should not have been the admissibility of claims.[16]

(2) Diplomatic protection belongs to the subject of "Treatment of Aliens". No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the draft articles on State Responsibility provides:

> "The responsibility of a State may not be invoked if:
>
> "(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

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[15] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), commentary on article 44, footnotes 722 and 726.

[16] Articles 28, 30, 31, 34-37. Much of the commentary on compensation (art. 36) is devoted to a consideration of the principles applicable to claims concerning diplomatic protection.

"(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as "functional protection". Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is a mechanism designed to secure reparation for injury to the national of a State premised on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the *Reparation for Injuries* case: "In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. … "[17]

PART ONE

GENERAL PROVISIONS

Article 1

Definition and Scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

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[17] *I.C.J. Reports*, 1949, p. 174 at pp. 185-186.

Commentary

(1) Article 1 defines diplomatic protection by describing its main elements and at the same time indicates the scope of this mechanism for the protection of nationals injured abroad.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,[18] maintain the distinction between primary and secondary rules and deal only with the latter.

(3) Article 1 makes it clear that the right of diplomatic protection belongs to the State. In exercising diplomatic protection the State adopts in its own right the cause of its national arising from the internationally wrongful act of another State. This formulation follows the language of the International Court of Justice in the *Interhandel* case when it stated that the Applicant State had "adopted the cause of its national"[19] whose rights had been violated. The legal interest of the State in exercising diplomatic protection derives from the injury to a national resulting from the wrongful act of another State.

(4) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in articles 4 and 9. The term "national" in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and where necessary, the two concepts are treated separately.

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[18] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, general commentary, paras. (1) to (3).

[19] *I.C.J. Reports*, 1959, p. 6 at p. 27. See also *Mavrommatis Palestine Concession*, 1924 *P.C.I.J. Series A*, No. 2.

(5) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between "diplomatic action" and "judicial proceedings" when describing the action that may be taken by a State when it resorts to diplomatic protection.[20] Article 1 retains this distinction but goes further by subsuming judicial proceedings under "other means of peaceful settlement". "Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. "Other means of peaceful settlement" embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection.

(6) Article 1 makes clear the point, already raised in the general commentary,[21] that the present articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded by an international organization to its agents, recognized by the International Court of Justice in its advisory opinion on *Reparation for Injuries*.[22]

(7) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 1961[23] and the Vienna Convention on Consular Relations of 1963.[24]

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[20] *Mavrommatis Palestine Concession*, ibid.; *Panevezyś-Saldutiskis Railway* case, *P.C.I.J. Reports Series A/B, No. 76*, p. 4 at p. 16; *Nottebohm* case, *I.C.J. Reports*, 1955, p. 24.

[21] See general commentary, para. (3).

[22] *I.C.J. Reports*, 1949, p. 174.

[23] United Nations *Treaty Series*, vol. 500, p. 95.

[24] United Nations *Treaty Series*, vol. 596, p. 261.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

Commentary

(1) Article 2 stresses that the right of diplomatic protection belongs to or vests in the State. It gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State.[25] This view was formulated more carefully by the Permanent Court of International Justice in the *Mavrommatis Palestine Concession* when it stated:

> **"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right - its right to ensure, in the person of its subjects, respect for the rules of international law."[26]**

This view is frequently criticized as a fiction difficult to reconcile with the realities of diplomatic protection, which require continuous nationality for the assertion of a diplomatic claim,[27] the exhaustion of local remedies by the injured national, and the assessment of damages suffered to accord with the loss suffered by the individual. Nevertheless the "Mavrommatis principle" or the "Vattelian fiction", as the notion that an injury to a national is an injury to the State has come to be known, remains the cornerstone of diplomatic protection.[28]

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[25] **In *The Law of Nations* (1758) Emmerich de Vattel stated: "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen" (chap. VI, p. 136).**

[26] ***P.C.I.J. Series A*, No. 2 1924, p. 12.**

[27] **See arts. 5 and 10.**

[28] **For a discussion of this notion, and the criticisms directed at it, see the First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, paras. 61-74.**

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national,[29] but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the *Barcelona Traction* case:

> "… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case".[30]

A proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law.[31]

(3) The right of a State to exercise diplomatic protection may only be carried out within the parameters of the present articles.

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[29] For an examination of domestic laws on this subject, see ibid., paras. 80-87.

[30] *I.C.J. Reports*, 1970, p. 44.

[31] See art. 4 in the First Report of the Special Rapporteur on Diplomatic Protection, A/CN.4/506. For the debate in the Commission, see *Official Records of the General Assembly, Supplement No. 10* (A/55/10), paras. 447-456.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

Commentary

(1) Whereas article 2 affirms the discretionary right of the State to exercise diplomatic protection, article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this article is on the bond of nationality between State and individual which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

(2) Paragraph 2 recognizes that there may be circumstances in which diplomatic protection may be exercised in respect of non-nationals. Article 8 provides for such protection in the case of stateless persons and refugees.

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Commentary

(1) Article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

> "in the present state of international law, questions of nationality are … in principle within the reserved domain".[32]

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

> "It is for each State to determine under its own law who are its nationals."[33]

More recently it has been endorsed by the 1997 European Convention on Nationality.[34]

(3) The connecting factors for the conferment of nationality listed in article 4 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (*jus soli*), descent (*jus sanguinis*) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following

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[32] *P.C.I.J. Reports, Series B*, No. 4, 1923, p. 24.

[33] 179 L.N.T.S., p. 89.

[34] E.T.S. No. 166, art. 3.

which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.[35] Nationality may also be acquired as a result of the succession of States.[36]

(4) The connecting factors listed in article 4 are those most frequently used by States to establish nationality. In some countries, where there are no clear birth records, it may be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(5) Article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,[37] as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State)

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[35] See, e.g., art. 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, United Nations *Treaty Series*, vol. 1249, p. 13, which prohibits the acquisition of nationality in such circumstances. See para. (6) below.

[36] See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 47.

[37] In the *Nottebohm* case the International Court of Justice stated: "According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection which has made him its national", *I.C.J. Reports*, 1955, p. 23.

were "extremely tenuous"[38] compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala".[39] This suggests that the Court did not intend to expound a general rule[40] applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, the Commission was mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.[41]

(6) The final phrase in article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that "it is for each State to determine under its own law who are its nationals" with the proviso "[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally

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[38] Ibid., p. 25.

[39] Ibid., p. 26.

[40] This interpretation was placed on the *Nottebohm* case by the Italian-United States Conciliation Commission in the *Flegenheimer* case, *25 I.L.R.* (1958), p. 148.

[41] For a more comprehensive argument in favour of limiting the scope of the *Nottebohm* case, see the First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, paras. 106-120.

recognized with regard to nationality".[42] Today, conventions, particularly in the field of human rights, require States to comply with international standards in the granting of nationality.[43] For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

> "States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[44]

(7) Article 4 therefore recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Article 4 requires that nationality should be acquired in a manner "not inconsistent with international law". The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the

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[42] See also, art. 3 (2) of the 1997 European Convention on Nationality.

[43] This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (advisory opinion OC-4/84 of 19 January 1984), in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights", *79 I.L.R.*, p. 296.

[44] United Nations *Treaty Series*, vol. 1249, p. 13. See also, art. 20 of the American Convention on Human Rights, United Nations *Treaty Series*, vol. 1144, p. 123, and art. 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations *Treaty Series*, vol. 660, p. 195.

State conferring nationality must be given a "margin of appreciation" in deciding upon the conferment of nationality[45] and that there is a presumption in favour of the validity of a State's conferment of nationality.[46]

Article 5

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

Commentary

(1) Although the continuous nationality rule is well established,[47] it has been subjected to considerable criticism[48] on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused

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[45] See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, 79 I.L.R.*, pp. 302-303.

[46] R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (1992), p. 856.

[47] See, for instance, the decision of the United States, International Claims Commission 1951-1954 in the *Kren* claim, *20 I.L.R.*, p. 233 at p. 234.

[48] See the comment of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case, *I.C.J. Reports*, 1970, pp. 101-102; see, too, E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (1990).

and lead to "nationality shopping" for the purpose of diplomatic protection.[49] The Commission is of the view that the continuous nationality rule should be retained but that exceptions should be allowed to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.[50] In these circumstances the Commission decided to leave open the question whether nationality has to be retained between injury and presentation of the claim.[51]

(3) The first requirement is that the injured national be a national of the claimant State at the time of the injury. Normally the date of the injury giving rise to the responsibility of the State for an internationally wrongful act will coincide with the date on which the injurious act occurred.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different

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[49] See the statement of Umpire Parker in opinion dealing with Germany's obligations and jurisdiction of the Commission as determined by the nationality of claims and *Administrative Decision No. V* of 31 October 1925, 19 *A.J.I.L.* (1925), p. 612 at p. 614: "any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency on behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims".

[50] H. Briggs "La Protection Diplomatique des Individus en Droit International: La Nationalité des Réclamations", *Annuaire de l'Institut de Droit International* (1965 I), pp. 72-73.

[51] The same approach was adopted by the Institute of International Law in its Warsaw Session, 1965, *Annuaire de l'Institut de Droit International*, vol. 51 (1965 II), pp. 260-262.

language to identify the date of the claim.[52] The phrase "presentation of the claim" is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or *dies ad quem* required for the exercise of diplomatic protection. The Commission has added the word "official" to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The entitlement of the State to exercise diplomatic protection begins at the date of the official presentation of the claim. There was, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection.

> According to this view the continuous nationality rule requires the bond of nationality "from the time of the occurrence of the injury until the making of the award".[53] In the light of the paucity of such cases in practice the Commission preferred to maintain the position reflected in draft article 5.

(6) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.[54]

(7) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three

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[52] See the dictum of Umpire Parker in *Administrative Decisions No. V*, 19 *A.J.I.L.* (1925), pp. 616-617.

[53] *Oppenheim's International Law*, eds. R.Y. Jennings and A. Watts, 9th ed. (1992), p. 512.

[54] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 301.

conditions are met: first, the person seeking diplomatic protection has lost his or her former nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Loss of nationality may occur voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) As discussed above,[55] fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States.

(10) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with article 4.

(11) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality. The injured person was not an alien when the injury occurred.

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[55] See para. (1) of commentary to the present draft article.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Commentary

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization, which does not result in the renunciation of a prior nationality. International law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

> "… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Article 6 is limited to the exercise of diplomatic protection by one of the States of which the injured person is a national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in article 7.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral

decisions[56] and codification endeavours,[57] the weight of authority does not require such a condition. In the *Salem* case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

> "the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power."[58]

This rule has been followed in other cases[59] and has more recently been upheld by the Iran-United States Claim Tribunal.[60] The Commission's decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

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[56] See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in the *de Born* case, *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 205 of 12 July 1926.

[57] See art. 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; resolution on "*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its Warsaw Session in 1965: *Résolutions de l'Institut de Droit International*, 1957-1991 (1992), p. 56 (art. 4 (b)); 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 23 (3), in L.B. Sohn and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 *A.J.I.L.* (1961), p. 548; Garcia Amador, Third Report on State Responsibility, in *Yearbook … 1958*, vol. II, p. 61, document A/CN.4/111 (art. 21 (3)).

[58] Award of 8 June 1932, 58 *U.N.R.I.A.A.*, vol. II, p. 1165 at p. 1188.

[59] See the decisions of the Italian-United States Conciliation Commission in the *Mergé* claim of 10 June 1955, *22 I.L.R.* (1955), p. 443 at p. 456; the *Vereano* claim, decision No. 172 of 17 May 1957, *24 I.L.R.* (1957), pp. 464-465; and the *Stankovic* claim of 26 July 1963, *40 I.L.R.* (1963), p. 155.

[60] See *Dallal v. Iran*, 3 *I.U.S.C.T.R* (1983), p. 23.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Commentary

(1) Article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[61]

Later codification proposals adopted a similar approach[62] and there was also support for this position in arbitral awards.[63] In 1949 in its advisory opinion in the case concerning *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".[64]

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.[65] This jurisprudence was relied on by the

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[61] See, too, art. 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, 23 *A.J.I.L.* (1929), Special Supplement 22.

[62] See art. 23 (5) of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens, 55 *A.J.I.L.* (1961), p. 545; art. 4 (a) of the resolution on "*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its 1965 Warsaw Session, art. 4 (a), *Résolutions de l'Institut de Droit International*, 1957-1991 (1992) 56; *Annuaire de l'Institut de Droit International* (1985 II), pp. 260-262.

[63] See *Alexander* case (1898) 3 Moore, *International Arbitrations*, p. 2529 (United States-British Claims Commission); *Oldenbourg* case, Decisions and Opinions of Commissioners, 5 October 1929 to 15 February 1930, p. 97 and *Honey* case. Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13 (British-Mexican Claims Commission); *Adams and Blackmore* case, decision No. 64 of 3 July 1931, *U.N.R.I.A.A.*, vol. v., pp. 216-217 (British-Mexican Claims Commission).

[64] *I.C.J. Reports*, 1949, p. 186.

[65] *James Louis Drummond* case 2 Knapp, P.C. Rep., p. 295, 12 Eng. Rep., p. 492; *Milani, Brignone Stevenson* and *Mathinson* cases (British-Venezuelan Mixed Claim Commission) reported in Ralston, *Venezuelan Arbitrations of 1903*, pp. 429-438, 710, 754-761, 438-455 respectively; *Carnevaro* case (Permanent Court of Arbitration, 1912) reported in Scott, *The Hague Court Reports*, vol. 1, at p. 284; *Hein* case of 26 April and 10 May 1922

International Court of Justice in another context in the *Nottebohm* case[66] and was given explicit approval by Italian-United States Conciliation Commission in the *Mergé* claim in 1955. Here the Conciliation Commission stated that:

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty."[67]

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.[68] Relying on these cases, the Iran-United States Claims Tribunal has applied the

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(Anglo-German Mixed Arbitral Tribunal), *Annual Digest of Public International Law* cases, vol. 1, 1919-1922, case No. 148, p. 216; *Blumenthal* case (French-German Mixed Tribunal), *Recueil des Décisions des Tribunaux Mixtes*, vol. 3 (1924), p. 616; *de Montfort* case of 10 July 1926 (French-German Mixed Tribunal), *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 206, p. 279; *Pinson* case (French-Mexican Mixed Claims Commission), *Annual Digest of Public International Law Cases*, vol. 4, 1927-1928, case Nos. 194 and 195 of 19 October 1928, pp. 297-301; *Tellech* case of 25 May 1928 (United States-Austria and Hungary Tripartite Claim Commission), *U.N.R.I.A.A.*, vol. VI, p. 248.

[66] *I.C.J. Reports*, 1955, pp. 22-23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein. See also the judicial decisions referred to in footnote 65.

[67] 22 *I.L.R.* (1955), p. 443 at p. 455 (para. V.5). See also *de Leon* case Nos. 218 and 227 of 15 May 1962 and 8 April 1963, *U.N.R.I.A.A.*, vol. XVT, p. 239 at p. 247.

[68] See, for example, *Spaulding* claim, decision No. 149, *24 I.L.R.* (1957), p. 452; *Zangrilli* claim of 21 December 1956, *24 I.L.R.* (1957), p. 454; *Cestra* claim, decision No. 165 of 28 February 1957, *24 I.L.R.* (1956), p. 454; *Puccini* claim, decision No. 173 of 17 May 1957, *24 I.L.R.* (1957), p. 454; *Salvoni Estate* claim, decision No. 169 of 9 May 1957, *24 I.L.R.* (1957), p. 455; *Ruspoli* claim, decision No. 170 of 15 May 1957, *24 I.L.R.* (1957), p. 457; *Ganapini* claim, decision No. 196 of 30 April 1959, *30 I.L.R.* (1959), p. 366; *Turri* claim, decision No. 209 of 14 June 1960, *30 I.L.R.* (1960), p. 371; *Graniero* claim, decision No. 186 of 20 January 1959, *30 I.L.R.* (1959), p. 451; *Di cicio* claim, decision No. 226 of 9 November 1962, *40 I.L.R.* (1962), p. 148.

principle of dominant and effective nationality in a number of cases.[69] Another institution which gives support to the dominant nationality principle is the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait. The condition applied by the Compensation Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.[70] Recent codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, Garcia Amador proposed that:

> "In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties."[71]

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.[72]

(4) The Commission is of the opinion that the principle which allows a State of dominant or effective nationality to bring a claim against another State of nationality reflects the present position in customary international law. This conclusion is given effect to in article 7.

(5) The authorities use the term "effective" or "dominant" to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. The Commission decided not to use either of these words to describe the required link but instead to use the term "predominant" as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing

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[69] See, in particular, *Esphahanian v. Bank Tejarat*, 21 *I.U.S.C.T.R* (1983), p. 166; case No. A/18, 5 *I.U.S.C.T.R.* (1984), p. 251.

[70] S/AC.26/1991/Rev.1, para. 11.

[71] A/CN.4/111, in *Yearbook ... 1958*, vol. II, p. 61.

[72] "Interim Report on the 'The Changing Law of Nationality of Claims'" in *International Law Association, Report of the 69th Conference* (2000), p. 646 (para. 11).

nationalities and the essence of this exercise is more accurately captured by the term "predominant" when applied to nationality than either "effective" or "dominant". It is moreover the term used by the Italian-United States Conciliation Commission in the *Mergé* claim which may be seen as the starting point for the development of the present customary rule.[73]

(6) The Commission makes no attempt to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

(7) Article 7 is framed in negative language: "A State of nationality may *not* exercise diplomatic protection … *unless*" its nationality is predominant. This is intended to show that the circumstances envisaged by article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(8) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the time of the injury and at the date of the official presentation of the claim. This requirement echoes the principle affirmed in article 5, paragraph 1, on the subject of continuous nationality. The phrases "at the time of the injury" and "at the date of the official presentation of the claim" are explained in the commentary on this article. The exception to the continuous nationality rule contained in article 5, paragraph 2, is not applicable here as the injured person contemplated in article 7 will not have lost his or her other nationality.

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[73] *22 I.L.R.* (1955), p. 455.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in *Dickson Car Wheel Company v. United Mexican States* held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

> "A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury."[74]

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961[75] and the Convention on the Status of Refugees of 1951.[76]

(2) Article 8, an exercise in progressive development of the law, departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a

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[74] *U.N.R.I.A.A.*, vol. IV, p. 669 at p. 678.

[75] United Nations *Treaty Series*, vol. 989, p. 175.

[76] Ibid., vol. 189, p. 150.

stateless person or a refugee. Although the Commission has acted within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954[77] which defines a stateless person "as a person who is not considered as a national by any State under the operation of its law".[78] This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.[79] Whereas some members of the Commission believed that this threshold is too high and could lead to a situation of lack of effective protection for the individuals involved, the majority took the view that the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim contained in article 5 are repeated in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim. This ensures that non-nationals are subject to the same rules as nationals in respect of the temporal requirements for the bringing of a claim.

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[77] Ibid., vol. 360, p. 117.

[78] Art. 1.

[79] The terms "lawful and habitual" residence are based on the 1997 European Convention on Nationality, art. 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a "stateless person having his habitual residence in that State", art. 21 (3) (c).

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are "unable or unwilling to avail [themselves] of the protection of [the State of Nationality]"[80] and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain the decision of the Commission to allocate a separate paragraph to each category.

(7) The Commission decided to insist on lawful residence and habitual residence as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of "lawfully staying"[81] for Contracting States in the issuing of travel documents to refugees. The Commission was influenced by two factors in reaching this decision. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.[82] Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*. Some members of the Commission argued that the threshold of lawful and habitual residence as preconditions for the exercise of diplomatic protection was too high also in case of refugees.[83]

(8) The term "refugee" in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term "recognized refugees", which appears in the 1997 European Convention on Nationality,[84] which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific

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[80] Art. 1 (A) (2) of the Convention Relating to the Status of Refugees.

[81] The *travaux préparatoires* of the Convention make it clear that "stay" means less than durable residence.

[82] See para. 16 of the Schedule to the Convention.

[83] See para. (4) of the commentary to this draft article.

[84] Art. 6 (4) (g).

Aspects of Refugee Problems in Africa,[85] widely seen as the model for the international protection of refugees,[86] and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America approved by the General Assembly of the O.A.S. in 1985.[87] However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it considered and treated as a refugee. This would be of particular importance for refugees in States not party to the existing international or regional instruments.

(9) The temporal requirements for the bringing of a claim contained in article 5 are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

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[85] United Nations *Treaty Series*, vol. 1001, p. 45. This Convention extends the definition of refugee to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

[86] Note on International Protection submitted by the United Nations High Commissioner for Refugees, *Official Records of the General Assembly, Forty-fifth Session*, document A/AC.96/830, p. 17, para. 35.

[87] O.A.S. General Assembly, XV Regular Session (1985), Resolution approved by the General Commission held at its fifth session on 7 December 1985.

(11) Both paragraphs 1 and 2 provide that a State of refuge "*may* exercise diplomatic protection". This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national.[88] A fortiori it has a discretion whether to extend such protection to a stateless person or refugee.

(12) The Commission stresses that article 8 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. A fortiori the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

> For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

Commentary

(1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article repeats the language of draft Article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.

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[88] See art. 2 and the commentary thereto.

(2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

(3) While the granting of nationality is "within the reserved domain"[89] of a State, international law, according to the International Court of Justice in the *Barcelona Traction* case, "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."[90] Two conditions are set for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. In practice the laws of most States require a company incorporated under its laws to maintain a registered office in its territory. Thus the additional requirement of registered office might seem superfluous. Nevertheless the International Court made it clear that both conditions should be met when it stated: "These two criteria have been confirmed by long practice and by numerous international instruments."[91] Possibly the International Court sought to recognize in the requirement of registered office the need for some tangible connection, however small, between State and company. This is confirmed by the emphasis it placed on the fact that Barcelona Traction's registered office was in Canada and that this created, together with other factors, a "close and permanent connection" between Canada and Barcelona Traction.[92]

(4) Article 9 uses the term "formed" instead of "incorporated" as "incorporated" is a technical term that is not known to all legal systems. Nevertheless "formed" clearly includes the concept of incorporation, as well as that of registration, in addition to other means that might be employed by a State to create a corporation. The "formation" (or incorporation) of a corporation

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[89] *Nationality Decrees in Tunis and Morocco, P.C.I.J. Reports, Series B*, No. 4, p. 24.

[90] *The Case Concerning the Barcelona Traction, Light and Power Company, Limited* (hereinafter *Barcelona Traction*), *I.C.J. Reports*, 1970, p. 3 at p. 42, para. 70.

[91] Ibid., p. 42, para. 70.

[92] Ibid., p. 42, para. 71.

under the laws of a particular State does not suffice for the purposes of diplomatic protection. In addition there must be some tangible connection with the State in which the corporation is formed - in the form of a registered office or seat of management (*siege social*) or some similar connection. This language seeks to give effect to the insistence of the International Court of Justice in *Barcelona Traction* that there be some connecting factor between the State in which the company is formed and the company. "Close and permanent connection", the language employed by the International Court to describe the link between the *Barcelona Traction* company and Canada, is not used as this would set too high a threshold for the connecting factor. Instead "registered office", the connecting factor required by the Court in addition to incorporation is preferred. As some legal systems do not require registered offices, but some other connection, "seat of management or some similar connection" are used as alternatives. Generally, Article 9 requires a relationship between the corporation and the State, which goes beyond mere formation or incorporation and is characterized by some additional connecting factor. This relationship, which is governed by the municipal law of the State that seeks to exercise diplomatic protection, may be described in different terms by different legal systems.[93]

(5) In *Barcelona Traction* the State of nationality of the majority shareholders (Belgium) argued that it was entitled to exercise diplomatic protection in respect of the corporation by reason of the fact that its shareholding gave it a genuine link with the corporation of the kind recognized in the *Nottebohm* case.[94] In rejecting this argument the International Court declined to dismiss the application of the genuine link test to corporations, as it held that *in casu* there was "a close and permanent" link between Barcelona Traction and Canada as it had its registered

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[93] The International Court in *Barcelona Traction* made it clear that there are no rules of international law on the incorporation of companies. Consequently it was necessary to have recourse to the municipal law to ascertain whether the conditions for incorporation had been met. The Court stated: "All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law", ibid., p. 33, para. 38.

[94] *I.C.J. Reports*, 1955, p. 4.

office there and had held its board meetings there for many years.[95] Article 9 does not require the existence of a genuine link between the corporation and protecting State of the kind advocated by Belgium in *Barcelona Traction*. Moreover it rejects the notion of a genuine link as a necessary connecting factor in the context of the diplomatic protection of corporations as this might result in the statelessness of corporations formed in one State with a majority shareholding in another State. It was the prevailing view in the Commission that the registered office, seat of management "or some similar connection" should not therefore be seen as forms of a genuine link, particularly insofar as this term is understood to require majority shareholding as a connecting factor.

(6) The phrase "or some similar connection" must be read in the context of the "registered office or the seat of its management", in accordance with the *eiusdem generis* rule of interpretation, which requires a general phrase of this kind to be interpreted narrowly to accord with the phrases that precede it. This means that the phrase is to have no life of its own. It must refer to some connection similar to that of "registered office" or "seat of management".

(7) In contrast with Article 4, Article 9 speaks of "the" State of nationality as meaning "the" State under whose law the corporation was formed. This language is used to avoid any suggestion that a corporation might have dual nationality. As multiple nationality is possible in the case of natural persons, Article 4 speaks of "a" State of nationality. Some members of the Commission did not agree with the view that corporations can only have one nationality.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

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[95] *I.C.J. Reports*, 1970, p. 42, paras. 70-71.

Commentary

(1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to Article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, voluntary and involuntary (as, possibly, in the case of marriage or adoption), and State succession, corporations may only change nationality by being re-formed or reincorporated in another State, in which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.[96] Only in one instance may a corporation, possibly, change nationality without changing legal personality, and that is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. The first requirement, that the injured corporation be a national of the claimant State at the time of the presentation of the claim, presents no problem. Difficulties arise, however, in respect of the *dies ad quem*, the date until which nationality of the claim is required.[97] The corporation must clearly be a national of the claimant State when the official presentation of the claim is made. For this proposition there is support in treaties, judicial decisions and doctrine.[98] In this sense the entitlement of the State to exercise

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[96] See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the *Orinoco Steamship Company Case*, *U.N.R.I.A.A.*, vol. IX, p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuela Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, the claim would not have been allowed; ibid., at p. 192.

[97] This matter was left undecided by the Permanent Court of International Justice in *Panevezys-Saldutiskis Railway* case, *P.C.I.J. Reports* (1939). *Series A/B* 76, p. 4 at p. 17. See also Fourth Report on nationality in relation to the succession of States, A/CN.4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

[98] See *Kren Claim 20 I.L.R.* (1953), p. 233 at p. 234.

diplomatic protection begins at the date of the official presentation of the claim. There was, however, support for the view that if the corporation should change its nationality between this date and the making of an award or a judgement it ceases to be a national for the purposes of diplomatic protection. According to this view the continuous nationality rule requires the bond of nationality "from the time of the occurrence of the injury until the making of the award".[99] In the light of the paucity of such cases in practice the Commission preferred to maintain the position reflected in draft article 10.[100]

(3) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take.[101]

(4) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was formed and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the *Barcelona Traction* case[102] and it has troubled certain

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[99] *Oppenheim's International Law*, eds. R. Jennings and A. Watts, 9th ed. (1992), p. 512.

[100] For a recent example of such a case, see *The Loewen Group Inc. and Raymond L. Loewen v. US*, International Centre for the Settlement of Investment Disputes, 26 June 2003, Case No. ARB(AF)/98/3.

[101] See, further, art. 43 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77.

[102] Judges Jessup, *I.C.J. Reports*, 1970, p. 193, Gros (ibid., p. 277), and Fitzmaurice (ibid., pp. 101-102), and Judge ad hoc Riphagen (ibid., p. 345).

courts and arbitral tribunals[103] and scholars.[104] Paragraph 2 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist - and therefore ceased to be its national - as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 2 must be read in conjunction with article 11, paragraph (a), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

Article 11

Protection of shareholders

The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the time of the injury, the nationality of the State alleged to be responsible for causing injury, and incorporation under the law of the latter State was required by it as a precondition for doing business there.

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[103] See the *Kunhardt* claim (Opinions in the American-Venezuelan Commission of 1903), *U.N.R.I.A.A.*, vol. IX, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paúl, at p. 180; *F.W. Flack, on behalf of the Estate of the Late D.L. Flack (Great Britain) v. United Mexican States*, decision No. 10 of 6 December 1929, *U.N.R.I.A.A.*, vol. V, p. 61 at p. 63.

[104] L. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public* (1969), pp. 206-7; W.E. Beckett, "Diplomatic Claims in Respect of Injuries to Companies", 17 *Transactions of the Grotus Society* (1932), p. 158 at p. 191; E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (1990), pp. 197-202.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the *Barcelona Traction* case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in "a limited liability company whose capital is represented by shares".[105] Such companies are characterized by a clear distinction between company and shareholders.[106] Whenever a shareholder's interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for "although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed".[107] Only where the act complained of is aimed at the direct rights of the shareholders does a shareholder have an independent right of action.[108] Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.[109]

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in *Barcelona Traction* was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf.[110]

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[105] *I.C.J. Reports*, 1970, p. 34, para. 40.

[106] Ibid., p. 34, para. 41.

[107] Ibid., p. 35, para. 44.

[108] Ibid., p. 36, para. 47.

[109] Ibid., p. 37, para. 50.

[110] Ibid., p. 35 (para. 43), p. 46 (paras. 86-87), p. 50 (para. 99).

Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities.[111] In this connection the Court indicated that if the shareholder's State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right.[112] Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.[113]

(3) The Court in *Barcelona Traction* accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation[114] - which was not the case with the *Barcelona Traction*; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level was through their State(s) of nationality[115] - which was not the case with *Barcelona Traction*. These two exceptions, which were not thoroughly examined by the Court in *Barcelona Traction* because they were not relevant to the case, are recognized in paragraphs (a) and (b) of Article 11. It is important to stress that, as the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions.

(4) Article 11 (a) requires that the corporation shall have "ceased to exist" before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the *Barcelona Traction* case the weight of authority favoured a less stringent test, one that permitted

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[111] Ibid., pp. 48-49, paras. 94-96.

[112] Ibid., p. 48, paras. 94-95.

[113] Ibid., p. 38 (para. 53), p. 50 (para. 98).

[114] Ibid., pp. 40-41, paras. 65-68.

[115] Ibid., p. 48, para. 92.

intervention on behalf of shareholders when the company was "practically defunct".[116] The Court in *Barcelona Traction*, however, set a higher threshold for determining the demise of a company. The "paralysis" or "precarious financial situation" of a company was dismissed as inadequate.[117] The test of "practically defunct" was likewise rejected as one "which lacks all legal precision".[118] Only the "company's status in law" was considered relevant. The Court stated: "Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise."[119] Subsequent support has been given to this test by the European Court of Human Rights.[120]

(5) The Court in *Barcelona Traction* did not expressly state that the company must have ceased to exist in *the place of incorporation* as a precondition to shareholders' intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain[121] but emphasized that this did not affect its continued existence in Canada, the State of incorporation: "In the present case, the *Barcelona Traction* is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much

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[116] *Delagoa Bay Railway Co.* case, B.J. Moore, *Digest of International Law* vol. VI (1906), p. 648; *El Triunfo* claim; B.J. Moore, *Digest of International Law* vol. VI (1906), p. 649; *Baasch & Romer* case, Netherlands-Venezuelan Mixed Commission 28 February 1903, *U.N.R.I.A.A.*, vol. X, p. 713 at 723.

[117] *I.C.J. Reports*, 1970, pp. 40-41, paras. 65 and 66.

[118] Ibid., p. 41, para. 66.

[119] Ibid., see also, the separate opinions of Judges Nervo (ibid., p. 256) and Ammoun (ibid., pp. 319-320).

[120] *Agrotexim* case, *E.C.H.R.*, *Series A*, No. 330-A, p. 25, para. 68.

[121] *I.C.J. Reports*, 1970, p. 40, para. 65. See too the separate opinions of Judges Fitzmaurice (ibid., p. 75) and Jessup (ibid., p. 194).

rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist."[122] A company is "born" in the State of incorporation when it is formed or incorporated there. Conversely, it "dies" when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

(6) The final phrase "for a reason unrelated to the injury" aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation's demise. This, according to Article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

(7) Article 11, paragraph (b) gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is, however, formulated in a restrictive manner so as to limit it to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

(8) There is tentative evidence in support of a broad exception, without the restrictive condition contained in paragraph (b), in State practice, arbitral awards[123] and doctrine.

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[122] Ibid., p. 41, para. 67.

[123] *Delagoa Bay Railway Company*, J.B. Moore, *Digest of International Law* (1906), vol. VI, p. 648; *Mexican Eagle (El Aguila)*, M. Whiteman, *Digest of International Law*, vol. VIII, pp. 1272-1274; *Romano-Americano*, Hackworth, *Digest of International Law*, vol. V, p. 841; *El Triunfo* award of 8 May 1902, *U.N.R.I.A.A.*, vol. XV, p. 467; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* award of 5 August 1926, *U.N.R.I.A.A.*, vol. II, p. 779 at p. 790. For a comprehensive examination of the authorities, see L. Caflisch *La protection des*

Significantly, however, the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway*,[124] *Mexican Eagle*[125] and *El Triunfo*.[126] While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

> "If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad."[127]

(9) In *Barcelona Traction*, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

> "It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of

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sociétés commerciales et des intérêts indirects en droit international public (1969); M. Jones, "Claims on Behalf of Nationals who are Shareholders in Foreign Companies", 26 *B.Y.I.L.* (1949), p. 225. See, too, E. Jiménez de Aréchaga "International Responsibility", in Max Sørensen (ed.), *Manual of International Law* (1968), p. 531 at pp. 580-581.

[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] M. Whiteman, *Digest of International Law*, vol. VIII, pp. 1273-1274.

diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of *Barcelona Traction*."[128]

Judges Fitzmaurice,[129] Tanaka[130] and Jessup[131] expressed full support in their separate opinions in *Barcelona Traction* for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.[132] While both Fitzmaurice[133] and Jessup[134] conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,[135] Morelli[136] and Ammoun,[137] on the other hand, were vigorously opposed to the exception.

(10) Developments relating to the proposed exception in the post-*Barcelona Traction* period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the

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[128] *I.C.J. Reports*, 1970, p. 48, para. 92.

[129] Ibid., pp. 72-75.

[130] Ibid., p. 134.

[131] Ibid., pp. 191-193.

[132] Judge Wellington Koo likewise supported this position in *Barcelona Traction (Preliminary Objections), I.C.J. Reports*, 1964, p. 58, para. 20.

[133] *I.C.J. Reports*, 1970, p. 73, paras. 15 and 16.

[134] Ibid., pp. 191-192.

[135] Ibid., pp. 257-259.

[136] Ibid., pp. 240-241.

[137] Ibid., p. 318.

company when it has been responsible for causing injury to the company.[138] In the *Case Concerning Elettronica Sicula S.p.A. (ELSI)*[139] a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction* or on the proposed exception left open in *Barcelona Traction* despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.[140] This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.[141] It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.[142]

(11) Before *Barcelona Traction* there was support for the proposed exception, although opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. The *obiter dictum* in *Barcelona Traction* and the separate opinions of

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[138] See *SEDCO Inc. v. National Iranian Oil Company and the Islamic Republic of Iran* case No. 129 of 24 October 1985, *84 I.L.R.*, pp. 484, 496 (interpreting art. VII (2) of the Algiers Claims Settlement Declaration); *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia 26 ILM* (1987), pp. 647, 652-654 (interpreting art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

[139] *I.C.J. Reports*, 1989, p. 15.

[140] Ibid, pp. 64 (para. 106), 79 (para. 132).

[141] This is clear from an exchange of opinions between Judges Oda (ibid., pp. 87-88) and Schwebel (ibid., p. 94) on the subject.

[142] This view is expressed by Yoram Dinstein in "Diplomatic Protection of Companies under International Law", in K. Wellens (ed.), *International Law: Theory and Practice* (1988), p. 505, at p. 512.

Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.[143] In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, article 11, paragraph (b) does not go this far. Instead it limits the exception to what has been described as a "Calvo corporation", a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the time of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation under the law of the latter State was required by it as a precondition for doing business there. No doubt there will be cases in which political pressure is brought to bear on foreign investors to incorporate a company in the State in which they wish to do business. In terms of the exception contained in paragraph (b) this is not sufficient: the law of the State must require incorporation as a precondition for doing business there.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in *Barcelona Traction* when it stated:

> "… an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. … The situation is different if the act complained of is aimed at the direct rights of the

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[143] According to the United Kingdom's 1985 Rules Applying to International Claims, "where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty's Government may intervene to protect the interests of the United Kingdom national" (Rule VI), reprinted in 37 *I.C.L.Q.* (1988), 1007.

> shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action."[144]

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders was before the Chamber of the International Court of Justice in the *ELSI* case.[145] However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international law on this subject. In *Agrotexim*,[146] the European Court of Human Rights, like the Court in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.[147]

(3) Article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In *Barcelona Traction* the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders' rights and corporate rights,

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[144] *I.C.J. Reports*, 1970, p. 36, paras. 46-47.

[145] *I.C.J. Reports*, 1989, p. 15.

[146] *Series A*, No. 330-A.

[147] Ibid., p. 23, para. 62.

particularly in respect of the right to participate in the management of corporations. That Article 12 is to be interpreted restrictively is emphasized by the phrases "the rights of the shareholders as such" and rights "as distinct from those of the corporation itself".

(4) Article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.[148]

Article 13

Other legal persons

> The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

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[148] In his separate opinion in *ELSI*, Judge Oda spoke of "the general principles of law concerning companies" in the context of shareholders' rights; *I.C.J. Reports*, 1989, pp. 87-88.

(2) In the ordinary sense of the word, "person" is a human being. In the legal sense, however, a "person" is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes, without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice[149] and the International Court of Justice.[150]

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice

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[149] ECJ, Case 81/87 *The Queen v. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483, at para. 19.

[150] *Barcelona Traction, I.C.J. Reports*, 1970, pp. 34-35 (para. 38).

shows that a commune[151] (municipality) or university[152] may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.[153] Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in worthy causes abroad would appear to fall into the same category as foundations.[154]

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person.

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[151] In *Certain German Interests in Polish Upper Silesia* the Permanent Court held that the commune of Ratibor fell within the category of "German national" within the meaning of the German-Polish Convention concerning Upper Silesia of 1922, *P.C.I.J. Reports, Series A*, No. 7, pp. 73-75.

[152] In *Appeal from a Judgment of the Czechoslovak-Hungarian Mixed Arbitral Tribunal* (*Peter Pázmány University v. Czechoslovakia*) the Permanent Court held that the Peter Pázmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it, *P.C.I.J. Reports, Series A/B*, No. 61, pp. 208, 227-232.

[153] As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection. Private universities would, however, qualify for diplomatic protection; as would private schools, if they enjoyed legal personality under municipal law.

[154] See, further, K. Doehring, "Diplomatic Protection of Non-Governmental Organizations", in *El derecho internacional en un mundo en transformación: liber amicorum: en homenaje al professor Eduardo Jiménez de Aréchaga* (1994), pp. 571-580.

The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in articles 9 and 10 respectively, will apply, "as appropriate", to the diplomatic protection of legal persons other than corporations. Initially the phrase "mutatis mutandis" was used, but the Commission decided not to employ a Latin maxim when "as appropriate" fully captured the meaning that the Commission sought to convey. No reference is made to articles 11 and 12 as they are concerned with shareholders' rights only.

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

> 1. A State may not bring an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 16, exhausted all local remedies.
>
> 2 "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Commentary

(1) Article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"[155] and by a Chamber of the International Court in the *Elettronica Sicula* (*ELSI*) case as "an important principle of customary international law".[156] The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its

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[155] *Interhandel* case (*Switzerland* v. *United States of America*) (Preliminary objections), *I.C.J. Reports*, 1959, p. 6 at p. 27.

[156] *Case concerning Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America* v. *Italy*), judgment, *I.C.J. Reports*, 1989, p. 15 at p. 42, para. 50.

own domestic system".[157] The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.[158]

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in article 8, are also required to exhaust local remedies.

(3) Paragraph 1 refers to the bringing of a claim rather than the presentation of the claim as the word "bring" more accurately reflects the process involved than the word "present" which suggests a formal act to which consequences are attached and is best used to identify the moment in time at which the claim is formally made.

(4) The phrase "all local remedies" must be read subject to article 16 which describes the exceptional circumstances in which local remedies need not be exhausted. Suggestions that reference be made in this provision to the need to exhaust only "adequate and effective" local remedies were not followed for two reasons. First, because such a qualification of the requirement that local remedies be exhausted needs special attention in a separate provision. Secondly, the fact that the burden of proof is generally on the respondent State to show that local remedies are available, while the burden of proof is generally on the applicant State to show that there are no effective remedies open to the injured person,[159] requires that these two aspects of the local remedies rule be treated separately.

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[157] *Interhandel* case, *I.C.J. Reports*, 1959, p. 6 at p. 27.

[158] Art. 22 on First Reading, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.7), chap. III D 1; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50; commentary to art. 44 on Second Reading, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) pp. 304-307.

[159] The question of burden of proof was considered by the Special Rapporteur in the Third Report on Diplomatic Protection; A/CN.4/523 and Add.1, paras. 102-118. The Commission decided not to include a draft article on this subject: *Official Records of the*

(5) The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted.[160] In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court.[161] Courts in this connection include both ordinary and special courts since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".[162]

(6) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do

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General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10) paras. 240-252. See also the *Elettronica Sicula (ELSI)* case, *I.C.J. Reports*, 1989, p. 15 at pp. 46-48 (paras. 59-63).

[160] In the *Ambatielos Claim* of 6 March 1956 the arbitral tribunal declared that "[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test", *U.N.R.I.A.A.*, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law* (2004), 2nd edition.

[161] This would include the *certiorari* process before the United States Supreme Court.

[162] *B. Schouw Nielsen v. Denmark*, Application No. 343/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights*, p. 412 at 438 (referring to the consideration of the Institute of International Law in its resolution of 1954 (*Annuaire*, 1956, vol. 46, p. 364)). See also *Lawless* case, Application No. 332/57 (1958-1959), 2 *Yearbook of the European Convention on Human Rights*, p. 308 at pp. 318-322.

not include remedies as of grace[163] or those whose "purpose is to obtain a favour and not to vindicate a right".[164] Requests for clemency and resort to an ombudsman generally fall into this category.[165]

(7) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of the International Court of Justice stated that:

> "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".[166]

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

> "all the contentions of fact and propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts".[167]

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[163] Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War ("*Finnish Ships Arbitration*") 1934, *U.N.R.I.A.A.*, vol. III, p. 1479.

[164] *De Becker v. Belgium*, Application No. 214/56, 1958-1959, 2 *Yearbook of the European Convention on Human Rights*, p. 214 at 238.

[165] See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice, Judgment of 31 March 2004, paras. 135-143.

[166] *I.C.J. Reports*, 1989, p. 15 at para. 59.

[167] *U.N.R.I.A.A.*, vol. III, at p. 1502.

(8) The foreign litigant must therefore produce the evidence available to him to support the essence of his claim in the process of exhausting local remedies.[168] He cannot use the international remedy afforded by diplomatic protection to overcome faulty preparation or presentation of his claim at the municipal level.[169]

Article 15

Category of claims

> Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 8.

Commentary

(1) The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national.[170] It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.

(2) In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before international courts have presented the phenomenon

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[168] *Ambatielos Claim, U.N.R.I.A.A.*, vol. XII, p. 83 at p. 120.

[169] D.P. O'Connell, *International Law*, vol. 2, p. 1059.

[170] This accords with the principle expounded by the Permanent Court of International Justice in the *Mavrommatis Palestine Concession* case that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right - its right to ensure, in the person of its subjects, respect for the rules of international law", *P.C.I.J., Series A*, 1924, *No.* 2, p. 12.

of the mixed claim. In the *Hostages* case,[171] there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,[172] there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies.

(3) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

> "the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]".[173]

Closely related to the preponderance test is the sine qua non or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the "but for" test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances the Commission preferred to adopt one test only - that of preponderance.

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[171] *United States Diplomatic and Consular Staff in Tehran* case (*United States v. Iran*), *I.C.J. Reports*, 1980, p. 3. See, too, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of the International Court of Justice of 31 March 2004, para. 40, in which the International Court held that Mexico had suffered directly through injury to its nationals in terms of art. 36 (1) of the Vienna Convention on Consular Relations of 1963.

[172] *I.C.J. Reports*, 1959, p. 6.

[173] *I.C.J. Reports*, 1989, p. 15 at p. 43, para. 52. See, also, the *Interhandel* case, *I.C.J. Reports*, 1959 at p. 28.

(4) Other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a diplomatic official[174] or State property[175] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national the claim will be indirect.

(5) Article 15 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,[176] there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its

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[174] *Hostages* case, *I.C.J. Reports*, 1980, p. 3.

[175] *Corfu Channel* case (*United Kingdom v. Albania*) (Merits), *I.C.J. Reports*, 1949, p. 4.

[176] Case concerning the *Air Services Agreement* of 27 March between the United States of America and France, decision of 9 December 1978, *U.N.R.I.A.A.*, vol. XVIII 415; *Applicability of the Obligation to Artbitrate under Section 21 of the United Nations Headquarters Agreement*, *I.C.J. Reports*, 1988, p. 29, para. 41.

unlawful treatment of a national.[177] Article 15 makes it clear that a request for a declaratory judgment per se is not exempt from the exhaustion of local remedies rule. Where the request for declaratory judgment is incidental to or related to a claim involving injury to a national - *whether linked to a claim for compensation or restitution on behalf of the injured national or not* - it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgment is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgment in order to avoid compliance with the local remedies rule.

Article 16

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(*d*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Commentary

(1) Article 16 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (c), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (d) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule.

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[177] See *Interhandel*, *I.C.J. Reports*, 1959 at pp. 28-29; *ELSI* case, *I.C.J Reports*, 1989 at p. 43.

Paragraph (a)

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the "futility" or "ineffectiveness" exception. The Commission considered three options for the formulation of a rule describing the circumstances in which local remedies need not be exhausted:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of an effective redress.

All three of these options enjoy some support among the authorities.

(3) The Commission considered the "obvious futility" test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*,[178] but decided that it set too high a threshold. On the other hand, the Commission took the view that the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions,[179] was too generous to the claimant. It therefore preferred the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case[180] and is supported by the writings of jurists.[181] Moreover, it accords with judicial decisions which

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[178] *U.N.R.I.A.A.*, vol. III, at p. 1504.

[179] *Retimag S.A. v. Federal Republic of Germany*, Application No. 712/60, 4 *Yearbook of the European Convention on Human Rights*, p. 385 at p. 400; *X, Y and Z v. UK*, Application Nos. 8022/77, 8027/77, 18 *European Commission of Human Rights, Decisions and Reports*, p. 66 at p. 74. See, too, the commentary to art. 22 of the draft articles on State Responsibility adopted by the Commission on first reading: *Yearbook ... 1977*, vol. II (Part Two), para. 48.

[180] *I.C.J. Reports*, 1957, at p. 39.

[181] See Third Report on Diplomatic Protection of 2002, A/CN.4/523 and Add.1, para. 35.

have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;[182] the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;[183] the local courts are notoriously lacking in independence;[184] there is a consistent and well-established line of precedents adverse to the alien;[185] the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;[186] or the respondent State does not have an adequate system of judicial protection.[187]

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[182] *Panevezys-Saldutiskis Railway* case, *P.C.I.J. Series A/B*, 1939, No. 76, p. 4 at p. 18, *Arbitration under Article 181 of the Treaty of Neuilly*, reported in 28 *A.J.I.L.*, 1934, p. 760 at p. 789; Claims of R. Gelbtrunk and "Salvador Commercial Co." et al., *U.N.R.I.A.A.*, vol. XV, p. 467 at pp. 476-477; *"The Lottie May" Incident*, Arbitration between Honduras and the United Kingdom, of 18 April 1899, *U.N.R.I.A.A.*, vol. XV, p. 29 at p. 31; Judge Lauterpacht's separate opinion in the *Norwegian Loans* case, *I.C.J. Reports*, 1957, at pp. 39-40; *Finnish Ships Arbitration*, *U.N.R.I.A.A.*, vol. III, p. 1535.

[183] *Arbitration under Article 181 of the Treaty of Neuilly* 28 *A.J.I.L.*, 1934, p. 789. See also *Affaire des Forêts du Rhodope Central (Fond)* 1933, *U.N.R.I.A.A.*, vol. III, p. 1405; *Ambatielos* claim, *U.N.R.I.A.A.*, vol. XII, p. 119; *Interhandel* case, *I.C.J. Reports*, 1959, at p. 28.

[184] *Robert E. Brown Claim* of 23 November 1923, *U.N.R.I.A.A.*, vol. VI, p. 120; *Vélasquez Rodríguez* case, *28 ILM* (1989), p. 291 at pp. 304-309.

[185] *Panevezys-Saldutiskis Railway* case, *P.C.I.J. Series A/B*, 1939, No. 76, p. 4 at p. 18; "*S.S. Lisman*" 1937, *U.N.R.I.A.A.*, voi. III, p. 1769 at p. 1773; "*S.S. Seguranca*" 1939, *U.N.R.I.A.A.*, vol. III, p. 1861 at p. 1868; *Finnish Ships Arbitration*, *U.N.R.I.A.A.*, vol. III, at p. 1495; *X. v. Federal Republic of Germany*, 1956, 1 *Yearbook of the European Convention on Human Rights*, p. 138; *X v. Federal Republic of Germany*, 1958-1959, 2 *Yearbook of the European Convention on Human Rights*, p. 342 at p. 344; *X v. Austria*, 1960, 3 *Yearbook of the European Convention on Human Rights*, p. 196 at p. 202.

[186] *Finnish Ships Arbitration*, *U.N.R.I.A.A.*, vol. III, pp. 1496-1497; *Vélasquez Rodríguez* case, 1989, *28 ILM* at pp. 304-309; *Yağci and Sargin v. Turkey*, judgment of 8 June 1995 *European Court of Human Rights, Reports and Decisions*, No. 319, p. 3 at p. 17, para. 42; *Hornsby v. Greece*, judgment of 19 March 1997, 1997-II *European Court of Human Rights, Reports and Decisions*, No. 33, p. 495 at p. 509, para. 37.

[187] *Mushikiwabo and others v. Barayagwiza*, 9 April 1996, *107 I.L.R.* 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies; resolution 1a/88, case 9755, *Ann.Rep 1 A Com HR* 1987/88.

(4) The question whether local remedies do or do not offer the reasonable possibility an effective redress must be determined with regard to the local law and circumstances at the time at which they are to be used. This is a question to be decided by the competent international tribunal charged with the task of examining the exhaustion of local remedies. The decision on this matter must be made on the assumption that the claim is meritorious.[188]

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts,[189] human rights instruments and practice,[190] judicial decisions[191] and scholarly opinion. The Commission was, aware of the difficulty attached to giving an objective content or meaning to "undue delay", or to attempting to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the *El Oro Mining* case:

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[188] *Finnish Ships Arbitration, U.N.R.I.A.A.*, vol. III, at p. 1504; *Ambatielos Claim, U.N.R.I.A.A.*, vol. XII, p. 99, pp. 119-120.

[189] See the discussion of early codifications attempts by *F.V. Garcia-Amador* in First Report, *Yearbook ... 1956*, vol. II, p. 173 at 223-226; art. 19 (2) of 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in 55 *A.J.I.L.*, 1961, p. 545 at p. 577.

[190] International Covenant on Civil and Political Rights (art. (1) (c)); American Convention on Human Rights (art. 46 (2) (c)); *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57, at p. 59; *Las Palmeras*, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdoğan v. Turkey*, Application No. 19807/92, No. 84 A, European Commission of Human Rights (1996), *Decisions and Reports*, p. 5 at p. 15.

[191] *El Oro Mining and Railway Company (Limited) (Great Britain) v. United Mexican States* decision No. 55 of 18 June 1931, *U.N.R.I.A.A.*, vol. V, p. 191 at p. 198. See also case concerning the *Administration of the Prince von Pless* Preliminary objections, *P.C.I.J. Series A/B*, 1933, No. 52, p. 11 at p. 16.

> "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter."[192]

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase "remedial process" is preferred to that of "local remedies" as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(7) The exception to the exhaustion of local remedies rule contained in article 16 (a), to the effect that local remedies do not need to be exhausted where "the local remedies provide no reasonable possibility of effective redress", does not cover situations where the local remedies might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down by a State whose airspace has been accidentally violated; or where serious obstacles are placed in the way of his using local remedies by the respondent State or some other body. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State or because of the existence of a special hardship exception.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of

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[192] *U.N.R.I.A.A.*, vol. V, at p. 198.

property or a contractual relationship with the respondent State.[193] Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in support of the existence of such an exception in the *Interhandel*[194] and *Salem*[195] cases, in other cases[196] tribunals have upheld the applicability of the local remedies rule despite the absence of a

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[193] See Amerasinghe, *Local Remedies in International Law* (2004), p. 169; T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", 35 *B.Y.I.L.*, 1959, p. 83 at p. 94.

[194] Here the International Court stated: "it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means", *I.C.J. Reports*, 1959 at p. 27. Emphasis added.

[195] In the *Salem* case an arbitral tribunal declared that "[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence", *U.N.R.I.A.A.*, vol. II, p. 1165 at p. 1202.

[196] *Finnish Ships Arbitration*, *U.N.R.I.A.A.*, vol. III, p. 1504; *Ambatielos Claim, U.N.R.I.A.A.*, vol. XII, p. 99.

voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[197] and the *Aerial Incident* case (*Israel v. Bulgaria*)[198] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,[199] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[200] in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) While the Commission took the view that it is necessary to provide expressly for this exception to the local remedies rule, it preferred not to use the term "voluntary link" to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. Moreover, it would be difficult to prove such a subjective criterion in practice. Hence the decision of the Commission to require the existence of a "relevant connection" between the injured alien and the host State. This connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word

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[197] Oral Pleadings of France, *I.C.J. Pleadings*, 1957, vol. I, p. 408.

[198] Case concerning the Aerial Incident of 27 July 1955 (*Israel v. Bulgaria*) (Preliminary objections), Oral Pleadings of Israel, *I.C.J. Pleadings*, 1959, pp. 531-532.

[199] 1935, *U.N.R.I.A.A.*, vol. III, p. 1905.

[200] *Virginius* case, reported in J.B. Moore, *A Digest of International Law*, 1906, vol. II, p. 895 at p. 903; *Jessie* case, reported in 16 *A.J.I.L.*, 1922, pp. 114-116.

"relevant", it was decided, would best allow a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien.

(11) The second part of paragraph (c) is designed to give a tribunal the power to dispense with the need for the exhaustion of local remedies where, in all the circumstances of the case, it would be unreasonable to expect compliance with this rule. Each case will obviously have to be considered on its own merits in making such a determination and it would be unwise to attempt to provide a comprehensive list of factors that might qualify for this exception. It is, however, suggested that the exception might be exercised where a State prevents an injured alien from gaining factual access to its tribunals by, for instance, denying him entry to its territory or by exposing him to dangers that make it unsafe for him to seek entry to its territory; or where criminal conspiracies in the host State obstruct the bringing of proceedings before local courts; or where the cost of exhausting local remedies is prohibitive.

Paragraph (d)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

> "In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly."[201]

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[201] *Government of Costa Rica* case (In the matter of Viviana Gallardo et al.) of 13 November 1981, Inter-American Court of Human Rights, *67 I.L.R.*, p. 578 at p. 587, para. 26. See also *20 ILM* (1981) 1057. See also *ELSI* case, *I.C.J. Reports*, 1989 at p. 42,

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an ad hoc arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

> "Consent of the parties to arbitration under its Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under its Convention."[202]

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.[203]

(15) Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was:

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para. 50; *De Wilde, Ooms and Versyp* cases ("Belgian Vagrancy Cases"), European Court of Human Rights, 1971, *56 I.L.R.*, p. 337 at p. 370, para. 55.

[202] United Nations *Treaty Series*, vol. 575, p. 159.

[203] *Government of Costa Rica* case, *67 I.L.R.* 140, p. 587, para. 26; "Belgian Vagrancy cases", *56 I.L.R.* 140, p. 370, para. 55.

"unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[204]

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[205] and the writings of jurists support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national".[206] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.[207] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

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[204] *I.C.J. Reports*, 1989 at p. 42, para. 50.

[205] See, for example, *Steiner and Gross v. Polish State 30 March 1928*, 1927-1928, *Annual Digest of Public International Law Cases*, vol. 4, p. 472; *American International Group Inc. v. Iran*, Award No. 93-2-3 (1983) 4 *Iran-US CTR*, p. 96.

[206] F.A. Mann, "State contracts and international arbitration", 42 *B.Y.I.L.*, 1967, p. 1 at p. 32.

[207] *I.C.J. Reports*, 1989, p. 15. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule, *P.C.I.J. Series A/B*, 1939, No. 76, p.19 (as had been argued by Judge van Eysinga in a dissenting opinion, ibid., pp. 35-36).

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,[208] the Commission preferred not to refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. The Commission took the view that it was wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 17

Actions or procedures other than diplomatic protection

> **The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.**

Commentary

(1) The customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal - the protection of human rights.[209] The present articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or

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[208] See *ELSI* case, *I.C.J. Reports*, 1989 at p. 44, para. 54; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* award of 30 November 1992 (Arbitration Tribunal), *102 I.L.R.*, p. 216, at p. 285, para. 6.33; *Foti and others* judgment of 10 December 1982 (merits), *71 I.L.R.*, p. 366 at p. 380, para. 46.

[209] See the First Report on Diplomatic Protection of 7 March 2000, A/CN.4/506, particularly paras. 22-32.

bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural persons or other entities, such as non-governmental organizations, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,[210] the International Convention on the Elimination of All Forms of Racial Discrimination,[211] the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[212] the European Convention on Human Rights,[213] the American Convention on Human Rights,[214] and the African Charter on Human and People's Rights.[215] The same conventions allow a State to protect its own nationals in inter-State proceedings. Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The decision of the International Court of Justice in the 1966 *South West Africa*[216] cases holding that a State might not bring legal proceedings to protect the rights of non-nationals is today seen as bad law and was expressly repudiated by the Commission in its articles on State responsibility.[217]

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[210] United Nations *Treaty Series*, vol. 999, p. 171, art. 41.

[211] Art. 11.

[212] United Nations *Treaty Series*, vol. 1465, p. 85, art. 21.

[213] Art. 24.

[214] Art. 45.

[215] United Nations *Treaty Series*, vol. 1520, p. 217, arts. 47-54.

[216] *Second Phase, I.C.J. Reports*, 1966, p. 6.

[217] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), commentary to art. 48, footnote 766.

Moreover, article 48 of those articles permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole.[218]

(3) The individual is also endowed with rights and remedies to protect itself against the injuring State, whether the individual's State of nationality or another State, in terms of international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.[219] Individual rights under international law may also arise outside the framework of human rights. In the *La Grand* case the International Court of Justice held that Article 36 of the Vienna Convention on Consular Relations "creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person;"[220] and in the *Avena* case the Court further observed "that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual."[221] A saving clause was inserted in the articles on State Responsibility - article 33 - to take account of this development in international law.[222]

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[218] Ibid.

[219] See, for example, the Optional Protocol to the International Covenant on Civil and Political Rights, United Nations *Treaty Series*, vol. 999, p. 171; art. 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; art. 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[220] *La Grand* (*Germany v. United States of America*), *Merits*, *I.C.J. Reports*, 2001, p. 466 at p. 494, para. 77.

[221] *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States of America*), Judgment of 31 March 2004, p. 26, para. 40.

[222] This article reads: "This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State": *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

(4) The actions or procedures referred to in article 17 include those available under both universal and regional human rights treaties as well as any other relevant treaty, for example, in a number of treaties on the protection of investment. Article 17 does not, however, deal with domestic remedies.

(5) This draft article is primarily concerned with the protection of human rights by means other than diplomatic protection. It does, however, also embrace the rights of States, natural persons and other entities conferred by treaties and customary rules on other subjects, such as the protection of foreign investment. The draft articles are likewise without prejudice to such rights that exist under procedures other than diplomatic protection.

(6) Article 17 makes it clear that the present draft articles are without prejudice to the rights that States, individuals or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not abandon its right to exercise diplomatic protection in respect of an individual if that individual should be a national.[223]

(7) One member of the Commission considered the remedies sought pursuant to human rights treaties to be *lex specialis* with priority over remedies pursuant to diplomatic protection. Some members of the Commission also expressed the view that articles 17 and 18 should be merged.

Article 18

Special treaty provisions

> The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

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[223] In *Selmouni v. France*, Application No. 25803/94 judgment of 28 July 1999, *ECHR*, 1999-V, p. 149, the Netherlands intervened in support of a national's individual complaint against France before the European Court of Human Rights. This did not preclude the Netherlands from making a claim in the exercise of diplomatic protection on behalf of the injured individual - had it chosen to do so.

Commentary

(1) Foreign investment is largely regulated and protected by bilateral investment treaties (BITs).[224] The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an ad hoc tribunal or a tribunal established by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[225] Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration and they avoid the political uncertainty inherent in the discretionary nature of diplomatic protection.

(2) Where the dispute resolution procedures provided for in BIT or ICSID are invoked, diplomatic protection is in most cases excluded.[226]

(3) Article 18 makes it clear that the present draft articles do not apply to the alternative, special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. However, it acknowledges that some treaties do not exclude recourse to diplomatic protection altogether. Hence the provision is formulated so that the draft articles do

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[224] This was acknowledged by the International Court of Justice in the *Barcelona Traction* case, *I.C.J. Reports*, 1970, p. 3 at p. 47 (para. 90).

[225] United Nations *Treaty Series*, vol. 575, p. 159.

[226] Art. 27 (1) of the ICSID Convention provides: "No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

not apply "where, and to the extent that" they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

Article 19

Ships' crews

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection on their behalf is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act.

Commentary

(1) The purpose of draft article 19 is to affirm the right of the State or States of nationality of a ship's crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,[227] for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

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[227] H. Myers, *The Nationality of Ships* (1967), pp. 90-108; R. Dolzer, "Diplomatic Protection of Foreign Nationals" in *Encyclopaedia of Public International Law* (1992), vol. 1, p. 1068; I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), p. 460.

(3) State practice emanates mainly from the United States. Under American law foreign seamen have traditionally been entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.[228] This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic communications and consular regulations of the United States.[229] Doubts have, however, been raised as to whether this practice provides evidence of a customary rule by the United States itself in a communication to the Commission dated 20 May 2003.[230]

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve".[231] In the "*I'm Alone*" case[232] which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for Injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.[233]

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[228] *Ross v. McIntyre*, 140 U.S. 453 (1891).

[229] G.H. Hackworth, *Digest of International Law* (1942), vol. 3, p. 418, vol. 4, pp. 883-884.

[230] This communication is on file with the Codification Division of the Office of Legal Affairs of the United Nations. The United States communication relies heavily on a critical article by Arthur Watts, "The Protection of Alien Seamen", 7 *ICLQ* (1958), p. 691.

[231] J.B. Moore, *International Arbitrations*, vol. 3, p. 2536.

[232] 29 *A.J.I.L.* (1935) 326.

[233] *I.C.J. Reports*, 1949, p. 174 at pp. 202-203 (Judge Hackworth) and pp. 206-207 (Judge Badawi Pasha).

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V "Saiga" (No. 2)* case (*Saint Vincent and the Grenadines v. Guinea*)[234] which provides support, albeit not unambiguous, for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines ("St. Vincent") and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent's claim, inter alia, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,[235] the Tribunal's reasoning suggests that it also saw the matter as a case involving something akin to diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.[236] St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality".[237] In dismissing Guinea's objection the Tribunal stated that the United Nations Convention on the Law of the Sea[238] in a number of relevant provisions, including article 292, drew no distinction between

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[234] Judgment, *ITLOS Reports 1999*, p. 10

[235] Ibid., para. 98.

[236] Ibid., para. 103.

[237] Ibid., para. 104.

[238] United Nations *Treaty Series*, vol. 1833, p. 3.

nationals and non-nationals of the flag State.[239] It stressed that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[240]

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship's crew. This was recognized by the Law of the Sea Tribunal in *Saiga* when it called attention to "the transient and multinational composition of ships' crews" and stated that large ships "could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue".[241] Practical considerations relating to the bringing of claims should not be overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship's crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. In the view of the Commission both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

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[239] Supra, note 234, para. 105.

[240] Ibid., para. 106.

[241] Ibid., para. 107.

CHAPTER V

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

61. At its fifty-second session, in 2000, the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work.[242] The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission's 2000 report. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

62. At its fifty-fourth session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session, the Commission established a Working Group on the topic. The Working Group in its report[243] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[244]

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[242] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. IX.1, para. 729.

[243] Ibid., chap. VIII.C, paras. 465-488.

[244] Ibid., chap. VIII.B, para. 464.

63. At its fifty-fifth session, in 2003, the Commission had before it the first report of the Special Rapporteur[245] proposing articles 1 to 3 dealing with the scope of the articles, the use of terms and general principles. At the same session, the Commission considered and referred the draft articles to the Drafting Committee. At its 2776th meeting, held on 16 July 2003, the Commission considered and adopted the report of the Drafting Committee on draft articles 1, 2 and 3.

B. Consideration of the topic at the present session

64. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/541).

65. The second report of the Special Rapporteur dealt with attribution of conduct to international organizations for which he proposed four draft articles: article 4 "General rule on attribution of conduct to an international organization",[246] article 5 "Conduct of organs placed at

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[245] Document A/CN.4/532.

[246] Draft article 4 read as follows:

General rule on attribution of conduct to an international organization

1. The conduct of an organ of an international organization, of one of its officials or another person entrusted with part of the organization's functions shall be considered as an act of that organization under international law, whatever position the organ, official or person holds in the structure of the organization.

2. Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization.

3. For the purpose of this article, "rules of the organization" means, in particular, the constituent instruments, [decisions and resolutions] [acts of the organization] adopted in accordance with them, and [established] [generally accepted] practice of the organization.

the disposal of an international organization by a State or another international organization",[247] article 6 "Excess of authority or contravention of instructions",[248] and article 7 "Conduct acknowledged and adopted by an international organization as its own".[249] The articles corresponded to Chapter II of Part One of draft articles on Responsibility of States for internationally wrongful acts. While that Chapter comprised eight articles on the question of attribution, a similar issue with regard to international organizations required only four draft articles. The Special Rapporteur noted that while some of the issues on attribution of conduct to a State have equivalent or similar application to attribution of conduct to an international organization, some of the others are specific to States or may apply to an international organization only in exceptional cases.

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[247] Draft article 5 read as follows:

Conduct of organs placed at the disposal of an international organization by a State or another international organization

> The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization's functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ.

[248] Draft article 6 read as follows:

Excess of authority or contravention of instructions

> The conduct of an organ, an official or another person entrusted with part of the organization's functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions.

[249] Draft article 7 read as follows:

Conduct acknowledged and adopted by an international organization as its own

> Conduct which is not attributable to an international organization under the preceding articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

66. The Special Rapporteur also noted that following the recommendations of the Commission,[250] the Secretariat had circulated the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. A similar request was made in paragraph 5 of General Assembly resolution 58/77 adopted on 9 December 2003. The resolution also invited States to submit information concerning their relevant practice. The Special Rapporteur said that, with a few noteworthy exceptions, replies had added little to already published materials. He expressed the hope that the continuing discussion in the Commission would prompt international organizations and States to send further contributions, so that the Commission's study could more adequately relate to practice and thus become more useful.

67. The Commission considered the second report of the Special Rapporteur at its 2800th to 2803rd meetings, held from 18 to 25 May 2004.

68. At its 2803rd meeting, held on 25 May 2004, the Commission referred draft articles 4 to 7 to the Drafting Committee.

69. The Commission considered and adopted the report of the Drafting Committee on draft articles 4 to 7 at its 2810th meeting held on 4 June 2004 (see section C.1 below).

70. At its 2826th to 2827th meetings held on 3 August 2004, the Commission adopted the commentaries to the aforementioned draft articles (see section C.2 below).

C. Text of draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of the draft articles

71. The text of draft articles provisionally adopted so far by the Commission is reproduced below.

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[250] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, and corrigendum (A/57/10 and Corr.1), chap. VIII, paras. 464 and 488 and ibid., *Fifty-eighth Session* (A/58/10), chap. IV, para. 52.

Responsibility of international organizations

Article 1[251]

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Article 2[252]

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3[253]

General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

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[251] For the commentary to this article see ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, pp. 34-37.

[252] Ibid., pp. 38-45.

[253] Ibid., pp. 45-49.

Article 4[254]

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.[255]

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[256]

Article 5[257]

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

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[254] For the commentary see section C.2 below.

[255] The location of paragraph 2 may be reconsidered at a later stage with a view of eventually placing all definitions of terms in article 2.

[256] The location of paragraph 4 may be reconsidered at a later stage with a view of eventually placing all definitions of terms in article 2.

[257] For the commentary see section C.2 below.

Article 6[258]

Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 7[259]

Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

2. Text of the draft articles with commentaries thereto

72. The text of the draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-sixth session are reproduced below.

Attribution of conduct to an international organization[260]

(1) According to article 3, paragraph 2, of the present draft articles, attribution of conduct under international law to an international organization is one condition for an international wrongful act of that international organization to arise, the other condition being that the same conduct constitutes a breach of an obligation that exists under international law for the international organization.[261] The following articles 4 to 7 address the question of attribution of conduct to an international organization. As stated in article 3, paragraph 2, conduct is intended to include actions and omissions.

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[258] For the commentary see section C.2 below.

[259] For the commentary see section C.2 below.

[260] The title is not yet adopted by the Drafting Committee or the Commission.

[261] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 45.

(2) As was noted in the commentary to article 3, responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization.[262] In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

(3) Like articles 4 to 11 on responsibility of States for internationally wrongful acts,[263] articles 4 to 7 of the present draft deal with attribution of conduct, not with attribution of responsibility. Practice often focuses on attribution of responsibility rather than on attribution of conduct. This is also true of several legal instruments. For instance, Annex IX of the United Nations Convention on the Law of the Sea, after requiring that international organizations and their member States declare their respective competences with regard to matters covered by the Convention, thus considers in article 6 the question of attribution of responsibility:

> "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention."[264]

Attribution of conduct to the responsible party is not necessarily implied.

(4) Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

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[262] Ibid., para. (1) of the commentary to art. 3, p. 45.

[263] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 80-122.

[264] United Nations *Treaty Series*, vol. 1833, p. 397 at p. 580.

(5) As was done on second reading with regard to the articles on State responsibility, the present articles only provide positive criteria of attribution. Thus, the present articles do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations. This point, which is hardly controversial, was recently expressed by the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the United Nations in a letter to the Permanent Representative of Belgium to the United Nations, concerning a claim resulting from a car accident in Somalia, in the following terms:

> "UNITAF troops were not under the command of the United Nations and the Organization has constantly declined liability for any claims made in respect of incidents involving those troops."[265]

(6) Articles 4 to 7 of the present draft consider most issues that are dealt with in regard to States in articles 4 to 11 of the draft articles on Responsibility of States for internationally wrongful acts. However, there is no text in the present articles covering the issues addressed in articles 9 and 10 on State responsibility.[266] The latter articles relate to conduct carried out in the absence or default of the official authorities and, respectively, to conduct of an insurrectional or other movement. These cases are unlikely to arise with regard to international organizations, because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering

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[265] Unpublished letter dated 25 June 1998.

[266] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 109-110.

territory,[267] the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant the presence of a specific provision. It is however understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply the pertinent rule which is applicable to States by analogy to that organization, either article 9 or article 10 of draft articles on Responsibility of States for internationally wrongful acts.

(7) Some of the practice which addresses questions of attribution of conduct to international organizations does so in the context of issues of civil liability rather than of issues of responsibility for internationally wrongful acts. The said practice is nevertheless relevant for the purpose of attribution of conduct under international law when it states or applies a criterion that is not intended as relevant only to the specific question under consideration.

Article 4

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2 For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.

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[267] For instance, on the basis of Security Council resolution 1244 (1999) of 10 June 1999, which authorized "the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [...]".

Commentary

(1) According to article 4 on responsibility of States for internationally wrongful acts,[268] attribution of conduct to a State is basically premised on the characterization as "State organ" of the acting person or entity. However, as the commentary makes clear,[269] attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

(2) It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[270] the International Court of Justice, when considering the status of persons acting for the United Nations, gave relevance only to the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agent" and did not give relevance to the fact that the person in question had or did not have an official status. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts."[271]

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[268] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 84.

[269] Ibid., p. 90.

[270] Article 7 of the Charter of the United Nations refers to "principal organs" and to "subsidiary organs". This latter term appears also in Articles 22 and 30 of the Charter.

[271] *I.C.J. Reports*, 1949, p. 174 at p. 177.

In the later advisory opinion on the *Applicability of article VI, section 22, of the Convention on the privileges and immunity of the United Nations*, the Court noted that:

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions - increasingly varied in nature - to persons not having the status of United Nations officials."[272]

With regard to privileges and immunities, the Court also said in the same opinion:

> "The essence of the matter lies not in their administrative position but in the nature of their mission."[273]

(3) More recently, in its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court pointed out that:

> "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents in their official capacity."[274]

In the same opinion the Court briefly addressed also the question of attribution of conduct, noting that in case of:

> "[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[275]

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[272] *I.C.J. Reports*, 1989, p. 177 at p. 194, para. 48.

[273] Ibid., p. 194, para. 47.

[274] *I.C.J. Reports*, 1999, p. 62 at p. 88, para. 66.

[275] Ibid., pp. 88-89, para. 66.

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

(4) What was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the organization's functions are entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

> "As a rule, one may attribute to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences."[276]

(5) The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization. When persons or entities are characterized as organs by the rules of the organization, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization. The category of agents is more elusive. It is thus useful to provide a definition of agents for the purpose of attribution. The definition given in paragraph 2 is based on the above-quoted passage of the advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.[277] As the Court then said, what matters for a person to be regarded as an agent is not his or her character as official but the fact that it is a "person through whom [the organization] acts".

(6) The legal nature of a person or entity is also not decisive for the purpose of attribution of conduct. Organs and agents are not necessarily natural persons. They could be legal persons or other entities through which the organization operates. Thus, paragraph 2 specifies that the term "agents" "includes officials and other persons or entities through whom the organization acts".

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[276] This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes et omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences." Document VPB 61.75, published on the Swiss Federal Council's web site.

[277] *I.C.J. Reports*, 1949, p. 174.

(7) The reference in paragraph 1 to the fact that the organ or agent acts "in the performance of functions of that organ or agent" is intended to make it clear that conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that organ or agent, and at any event is not attributable when the organ or agent acts in a private capacity. The question of attribution of ultra vires conduct is addressed in article 6.

(8) According to article 4, paragraph 1, of draft articles on Responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".[278] The latter specification could hardly apply to an international organization. The other elements could be retained, but it is preferable to use simpler wording, also in view of the fact that, while all States may be held to exert all the above-mentioned functions, organizations vary significantly from one another also in this regard. Thus paragraph 1 simply states "whatever position the organ or agent holds in respect of the organization".

(9) The relevant international organization establishes which functions are entrusted to each organ or agent. This is generally made, as indicated in paragraph 3, by the "rules of the organization". By not making application of the rules of the organization the only criterion, the wording of paragraph 3 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

(10) The definition of "rules of the organization" in paragraph 4 is to a large extent tributary to the definition of the same term that is included in the 1986 Vienna Convention on the Law of Treaties between States and international organizations and between international organizations.[279] Apart from a few minor stylistic changes, the definition in paragraph 4 differs

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[278] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 84 and paras. 6-7 of the related commentary, pp. 85-88.

[279] A/CONF.129/15. Art. 2, para. 1 (j) states that "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

from the one contained in the codification convention only because it refers, together with "decisions" and "resolutions", to "other acts taken by the organization". This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. For the purpose of article 4, those decisions, resolutions and other acts are relevant, whether they are regarded as binding or not, in so far as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, consistently with the wording of the model provision,[280] although a given organization may well possess a single constituent instrument.

(11) One important feature of the definition of "rules of the organization" which is adopted in paragraph 4 is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instruments and formally accepted by members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[281]

(12) Article 5 of draft articles on Responsibility of States for internationally wrongful acts concerns "conduct of persons or entities exercising elements of governmental authority".[282] This terminology is generally not appropriate for international organizations. One would have to express in a different way the link that an entity may have with an international organization. It is however superfluous to put in the present articles an additional provision in order to include

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[280] Ibid.

[281] *I.C.J. Reports*, 1949, p. 174 at p. 180.

[282] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 92.

persons or entities in a situation corresponding to the one envisaged in article 5 of draft articles on Responsibility of States for internationally wrongful acts. The term "agent" is given in paragraph 2 a wide meaning that adequately covers these persons or entities.

(13) A similar conclusion may be reached with regard to the persons or groups of persons referred to in article 8 of draft articles on Responsibility of States for internationally wrongful acts.[283] This provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should instead persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in paragraph 2 of draft article 4. As was noted above, paragraph 9 of the present commentary, in exceptional cases, a person or entity would be considered, for the purpose of attribution of conduct, as entrusted with functions of the organization, even if this was not in accordance with the rules of the organization.

(14) Paragraphs 2 and 4 contain definitions which are explicitly given for the purpose of article 4, but have wider implications. For instance, the term "agents" also appears in articles 5 and 6 and clearly retains the same meaning. Again, the "rules of the organization", although not referred to in articles 6 and 7, are to a certain extent relevant also for these provisions (see paragraphs 2 and 5 of the commentary to article 6 and paragraph 5 of the commentary to article 7). Further articles of the draft may refer to either "agents" or "rules of the organization". This may make it preferable to move, at a later stage of the first reading, current paragraphs 2 and 4 of article 4 to article 2 ("Use of terms"),[284] with the necessary changes in the wording.

Article 5

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

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[283] Ibid., p. 103.

[284] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 38.

Commentary

(1) When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 4 would apply. Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.[285] In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization.

(2) The lending State or organization may conclude an agreement with the receiving organization over placing an organ or agent at the latter organization's disposal. The agreement may state which State or organization would be responsible for conduct of that organ or agent. For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[286] The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.

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[285] This is generally specified in the agreement that the United Nations concludes with the contributing State. See the Secretary-General's report (A/49/691), para. 6.

[286] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

(3) The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 5 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. Article 6 of the draft articles on Responsibility of States for internationally wrongful acts [287] takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". However, the commentary to article 6 of the draft articles on Responsibility of States for internationally wrongful acts explains that, for conduct to be attributed to the receiving State, it must be "under its exclusive direction and control, rather than on instructions from the sending State".[288] At any event, the wording of article 6 cannot be replicated here, because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations.

(4) With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State.[289] In the context of the placement of an organ or agent at the disposal of an international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity - the contributing State or organization or the receiving organization - conduct is attributable.

(5) The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state:

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[287] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 95.

[288] Para. 2 of the commentary to art. 6, ibid., p. 95.

[289] Ibid., pp. 103-109.

> "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."[290]

This statement sums up United Nations practice relating to the United Nations Operation in the Congo (ONUC),[291] the United Nations Peacekeeping Force in Cyprus (UNFICYP)[292] and later peacekeeping forces.[293]

(6) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs.[294] This may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line with regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora:[295]

> "Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention."[296]

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[290] Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division.

[291] See the agreements providing for compensation that were concluded by the United Nations with Belgium (United Nations *Treaty Series*, vol. 535, p. 191), Greece (ibid., vol. 565, p. 3), Italy (ibid., vol. 588, p. 197), Luxembourg (ibid., vol. 585, p. 147) and Switzerland (ibid., vol. 564, p. 193).

[292] *United Nations Juridical Yearbook* (1980), pp. 184-185.

[293] See Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), paras. 7-8, p. 4.

[294] See above, para. (1) and note 285.

[295] United Nations *Treaty Series*, vol. 993, p. 243.

[296] *United Nations Juridical Yearbook* (1994), p. 450.

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

(7) As has been held by several scholars,[297] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the Commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

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[297] J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de Droit international*, vol. 8 (1962), p. 427 at p. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at pp. 62-63 and 73-79; E. Butkiewicz, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981-1982), p. 117 at pp. 123-125 and 134-135; M. Perez Gonzalez, "Les organisations internationales et le droit de la responsabilité", *Revue générale de Droit international public*, vol. 99 (1988), p. 63 at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64-67; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996), pp. 241-143; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 379-380; I. Scobbie, "International Organizations and International Relations" in R.J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 51; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by M. Bothe, *Streitkräfte internationaler Organisationen* (Köln/Berlin: Heymanns Verlag, 1968), p. 87. Difficulties in drawing a line between operational and organizational control were underlined by L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, vol. 78 (1995), p. 881 at pp. 887-888. The draft suggested by the Committee on Accountability of International Organizations of the International Law Association referred to a criterion of "effective control (operational command and control)". International Law Association, *Report of the Seventieth Conference held in New Delhi, 2-6 April 2002* (2002), p. 797.

> "The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."[298]

(8) The United Nations Secretary-General held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[299]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

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[298] S/1994/653, paras. 243-244, p. 45.

[299] A/51/389, paras. 17-18, p. 6.

(9) The principles applicable to peacekeeping forces may be extended to other State organs placed at the disposal of the United Nations, such as disaster relief units, about which the United Nations Secretary-General wrote:

> "If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) [...]"[300]

(10) Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between the World Health Organization (WHO) and the Pan American Health Organization (PAHO), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[301] The Legal Counsel of WHO noted that:

> "On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO."[302]

Article 6

Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

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[300] *United Nations Juridical Yearbook* (1971), p. 187.

[301] Art. 2 of the Agreement of 24 May 1949, reproduced at http://intranet.who.int.

[302] Unpublished letter of 19 December 2003, sent by the Legal Counsel of WHO to the United Nations Legal Counsel.

Commentary

(1) Article 6 deals with ultra vires conduct of organs or agents of an international organization. This conduct may exceed the competence of the organization.[303] It also may be within the competence of the organization, but exceed the authority of the acting organ or agent. While the wording only refers to the second case, the first case is also covered because an act exceeding the competence of the organization necessarily exceeds the organ's or agent's authority.

(2) Article 6 has to be read in the context of the other provisions relating to attribution, especially article 4. It is to be understood that, in accordance with article 4, organs and agents are persons and entities exercising functions of the organization. Apart from exceptional cases (paragraph 9 of the commentary to article 4) the rules of the organization, as defined in article 4, paragraph 4, will govern the issue whether an organ or agent has authority to take a certain conduct. It is implied that instructions are relevant to the purpose of attribution of conduct only if they are binding the organ or agent. Also in this regard the rules of the organization will generally be decisive.

(3) The wording of article 6 closely follows that of article 7 of the draft articles on Responsibility of States for internationally wrongful acts.[304] The main textual difference is due to the fact that the latter article takes the wording of articles 4 and 5 on State responsibility into account and thus considers the ultra vires conduct of "an organ of a State or a person or entity empowered to exercise elements of governmental authority", while the present article only needs to be aligned on article 4 and thus more simply refers to "an organ or an agent of an international organization".

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[303] As the International Court of Justice said in its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflicts*:

> "[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

I.C.J. Reports, 1996, p. 66 at p. 78 (para. 25).

[304] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 99.

(4) The key element for attribution both in article 7 of the draft articles on Responsibility of States for internationally wrongful acts and in the present article is the requirement that the organ or agent acts "in that capacity". This wording is intended to convey the need for a close link between the ultra vires conduct and the organ's or agent's functions. As was said in the commentary to article 7 on State responsibility, the text "indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State".[305]

(5) Article 6 only concerns attribution of conduct and does not prejudice the question whether an ultra vires act is valid or not under the rules of the organization. Even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.

(6) The possibility of attributing to an international organization acts that an organ takes ultra vires has been admitted by the International Court of Justice in its advisory opinion on *Certain expenses of the United Nations*, in which the Court said:

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent."[306]

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[305] Para. (8) of the commentary to art. 7, ibid., p. 102.

[306] *I.C.J. Reports*, 1962, p. 168.

The fact that the Court considered that the United Nations would have to bear expenses deriving from ultra vires acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct. Denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or to another organization.

(7) A distinction between the conduct of organs and officials and that of other agents would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[307] The International Court of Justice appears to have asserted the organization's responsibility for ultra vires acts also of persons other than officials. In its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court stated:

> "[...] it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."[308]

One obvious reason why an agent - in the case in hand, an expert on mission - should take care not to exceed the scope of his or her functions also in order to avoid that claims be preferred against the organization is that the organization could well be held responsible for the agent's conduct.

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[307] The Committee on Accountability of International Organizations of the International Law Association suggested the following rule:

> "The conduct of organs of an IO or of officials or agents of an Organization shall be considered an act of that Organization under international law if the organ or official or agent were acting in their official capacity, even if that conduct exceeds the authority or contradicts instructions given (ultra vires)."

International Law Association, *Report of the Seventieth Conference held in New Delhi 2-6 April 2002* (2002), p. 797.

[308] *I.C.J. Reports*, 1999, p. 62 at p. 89 (para. 66).

(8) The rule stated in article 6 also finds support in the following statement of the General Counsel of the International Monetary Fund:

> "Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization."[309]

(9) Practice of international organizations confirms that ultra vires conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

> "United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts [...] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may none the less assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[310]

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[309] Unpublished letter of 7 February 2003 from the General Counsel of the International Monetary Fund to the Secretary of the International Law Commission.

[310] *United Nations Juridical Yearbook* (1986), p. 300.

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[311] the "on-duty" conduct may be so attributed. One would then have to examine in the case of ultra vires conduct if it related to the functions entrusted to the person concerned.

Article 7

Conduct acknowledged and adopted by an international organization as its own

> Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Commentary

(1) Article 7 concerns the case in which an international organization "acknowledges and adopts" as its own a certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the "extent" reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

(2) Article 7 mirrors the content of article 11 of the draft articles on Responsibility of States for internationally wrongful acts,[312] which is identically worded but for the reference to a State instead of an international organization. As the commentary to article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct "may not have been attributable".[313] In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.

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[311] A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgement of 10 May 1979. *United Nations Juridical Yearbook* (1979), p. 205.

[312] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 118.

[313] Para. (1) of the commentary to art. 11, ibid., p. 119.

(3) In certain instances of practice, relating both to States and to international organizations, it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility. This is not altogether certain, for instance, with regard to the following statement made on behalf of the European Community in the oral pleading before a WTO panel in the case *European Communities - Customs Classification of Certain Computer Equipment*. The European Community declared that it was

> "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States".[314]

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Dragan Nikolic*. The question was raised whether the accused's arrest was attributable to the Stabilization Force (SFOR). The Chamber first noted that the ILC articles on State responsibility were "not binding on States". It then referred to article 57 and observed that the articles - were "primarily directed at the responsibility of States and not at those of international organizations or entities".[315] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand".[316] This led the Chamber to quote extensively article 11 and the related commentary.[317] The Chamber then added:

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[314] Unpublished document.

[315] Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, 9 October 2002, Case No. IT-94-2-PT, para. 60.

[316] Ibid., para. 61.

[317] Ibid., paras. 62-63.

> "The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have 'acknowledged and adopted' the conduct undertaken by the individuals 'as its own'."[318]

The Chamber concluded that SFOR's conduct did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[319]

(5) No policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption. The question may arise regarding the competence of the international organization in making that acknowledgement and adoption, and concerning which organ or agent would be competent to do so. Although the existence of a specific rule is highly unlikely, the rules of the organization govern also this issue.

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[318] Ibid., para. 64.

[319] Ibid., para. 106. The appeal was rejected on a different basis. On the point here at issue the Appeals Chamber only noted that "the exercise of jurisdiction should not be declined in case of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State or an international organization, or other entity, do not necessarily in themselves violate State sovereignty". Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, Case No. IT-94-2-AR73, para. 26.

CHAPTER VI

SHARED NATURAL RESOURCES

A. Introduction

73. The Commission, at its fifty-fourth session in 2002, decided to include the topic "Shared natural resources" in its programme of work.[320]

74. The Commission further decided, at its 2727th meeting, on 30 May 2002, to appoint Mr. Chusei Yamada as Special Rapporteur.[321]

75. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work.

76. At its fifty-fifth session, in 2003, the Commission considered the first report of the Special Rapporteur (A/CN.4/533 and Add.1).

B. Consideration of the topic at the present session

77. At the present session the Commission had before it the second report of the Special Rapporteur (A/CN.4/539 and Add.1).

78. The Commission considered the second report of the Special Rapporteur at its 2797th, 2798th and 2799th meetings, held on 12, 13 and 14 May 2004, respectively.

79. At its 2797th meeting, the Commission established an open-ended Working Group on Transboundary Groundwaters, chaired by the Special Rapporteur. The Working Group held three meetings.

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[320] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10); chap. X.A.1, para. 518.

[321] Ibid., para. 519.

80. The Commission also had two informal briefings by experts on groundwaters from the Economic Commission for Europe (ECE), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO) and the International Association of Hydrogeologists (IAH) on 24 and 25 May 2004. Their presence was arranged by UNESCO.

81. At the request of the Special Rapporteur, the Commission, at its 2828th meeting, on 4 August 2004, agreed that a questionnaire, prepared by the Special Rapporteur, be circulated to Governments and relevant intergovernmental organizations asking for their views and information regarding groundwaters.

1. Introduction by the Special Rapporteur of his second report

82. The Special Rapporteur noted that A/CN.4/539/Add.1 provided some hydrogeological case studies and other technical background and that, unfortunately, some technical difficulties precluded the inclusion in the addendum of a review of existing treaties and groundwater world maps, as envisaged in paragraph 6 of his second report (A/CN.4/539). In this connection, he indicated that these materials and others would be made available to the Commission in an informal setting.

83. In view of the sensitivity expressed both in the Commission and in the Sixth Committee on the use of the term "shared resources", which might refer to the common heritage of mankind or to the notion of shared ownership, the Special Rapporteur proposed to focus on the sub-topic of "transboundary groundwaters" without using the term "shared".

84. Although the second report contained several draft articles, the Special Rapporteur stressed that this should not be construed as indicative of the final form the Commission's endeavour would take. He did not intend to recommend to refer any of the draft articles to the Drafting Committee at this initial stage; the draft articles were formulated so as to generate comments, to receive more concrete proposals and also to identify additional areas that should be addressed.

85. The Special Rapporteur acknowledged some of the criticism regarding his statement in 2003 that almost all the principles embodied in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter referred to as the "1997 Convention") would also be applicable to groundwaters, thus recognizing the need to adjust such principles. Nonetheless, he also stated his continued belief that the 1997 Convention offered the basis upon which to elaborate a regime for groundwaters.

86. In paragraph 8 of the report, the Special Rapporteur laid down a general framework for formulating draft articles.[322] This framework reflected more or less that of

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[322] The general framework prepared by the Special Rapporteur is as follows:

Part I. Introduction

Scope of the Convention
Use of terms (definition)

Part II. General principles

Principles governing uses of transboundary groundwaters
Obligation not to cause harm
General obligation to cooperate
Regular exchange of data and information
Relationship between different kinds of uses

Part III. Activities affecting other States

Impact assessment
Exchange of information
Consultation and negotiation

Part IV. Protection, preservation and management

Monitoring
Prevention (Precautionary principle)

Part V. Miscellaneous provisions

Part VI. Settlement of disputes

Part VII. Final clauses

the 1997 Convention and also took into account the draft articles on the Prevention of transboundary harm from hazardous activities, adopted by the Commission in 2001.

87. In the second report, the Special Rapporteur presented draft articles for Part I, on Introduction, and for Part II, on General principles. He stated his plan to present draft articles for all the remaining parts in 2005 and requested comments on the general framework proposed, as well as suggestions for amendments, additions or deletions.

88. As regards Part I, Introduction, the Special Rapporteur noted that he continued to use the term "groundwater" in the report, yet had opted to use the term "aquifer", which was a scientific and more precise term, in the draft articles.

89. The scope of the proposed convention was found in paragraph 10 of the report as draft article 1.[323] The Special Rapporteur noted that in 2002, he had proceeded on the assumption that the Commission's endeavour would only encompass those transboundary groundwaters that were not covered by the 1997 Convention, which were designated as "confined transboundary groundwaters". The Commission's use of the term "confined" was to indicate that such a body of groundwaters was "unrelated", "not connected" or "not linked" to the surface waters. However, the use of the term "confined" had posed serious problems.

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[323] A/CN.4/539, draft article 1 reads as follows:

Scope of the present Convention

> The present Convention applies to uses of transboundary aquifer systems and other activities which have or are likely to have an impact on those systems and to measures of protection, preservation and management of those systems.

90. Firstly, groundwater experts use the term in entirely different meaning. For them, "confined" is the hydraulic status of waters under pressure. Accordingly, it was preferable to omit the term "confined" in order to avoid confusion between lawyers and groundwater experts, as the latter will be involved in the implementation of the proposed convention.

91. Another important reason to drop the notion of "confined" from the scope of the proposed convention was the inappropriate assumption that the Commission should deal exclusively with groundwaters not covered by the 1997 Convention. The Special Rapporteur explained why such an approach was not advisable by referring to the huge Nubian Sandstone Aquifer System which is found in four States: Chad, Egypt, Libya and Sudan. Although the system is connected with the river Nile in the vicinity of Khartoum, thus making the 1997 Convention applicable to the whole aquifer system, the connection to the Nile is actually negligible. The aquifer system practically does not receive recharge, it has all the characteristics of groundwaters and not of the surface waters. A similar situation also exists for the Guarani Aquifer (Argentina, Brazil, Paraguay and Uruguay). The case studies of these two aquifers were included in the addendum.

92. The Special Rapporteur was of the view that the Commission should cover these two important aquifers and he therefore decided to delete the limiting factor of "unrelated to the surface waters" from the scope of the draft convention.

93. This action could lead to the situation of dual application of the proposed convention as well as the 1997 Convention to the same aquifer system in many instances. In this connection, the Special Rapporteur did not feel that parallel application would cause a problem and that, in any event, a draft article according one primacy could be envisaged to deal with any potential difficulty.

94. In relation to his proposal to regulate activities other than uses of transboundary groundwaters, the Special Rapporteur explained that this was necessary to protect groundwaters from pollution caused by such surface activities as industry, agriculture and forestation.

95. As for draft article 2 on definitions,[324] he noted that it contained, inter alia, technical definitions of aquifer and aquifer system. In the case of groundwaters, the concept of aquifer consists of both the rock formation which stores waters and the waters in such a rock formation, so it is sufficient to say the uses of aquifers to cover all categories of the uses. In this connection, the Special Rapporteur referred to case 4 of the annex to the addendum which illustrates domestic aquifers of State A and State B that are, nonetheless, hydrologically linked and should therefore be treated as a single system for proper management of these aquifers. Such an aquifer system is transboundary and therefore he considered it necessary to have a definition of aquifer system and proposed to regulate aquifer systems throughout the draft convention.

96. The Special Rapporteur also referred to case 3 of the annex to the addendum and noted that there could also be a case 3 bis, where a domestic aquifer was hydrologically linked to a domestic river of State B. Although in paragraph 2 of the addendum, he had stated that both the 1997 Convention and the proposed convention would be applicable to case 3, on reflection he was no longer certain if this hydrological link was the connection to the surface waters that the drafters of the 1997 Convention had in mind. If it was and the 1997 Convention was applicable, its article 7 containing the no harm principle would alleviate some of the problems. The formulation of draft article 2 however did not make such an aquifer transboundary and an adequate solution on how to deal with such an aquifer was thus required.

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[324] Ibid., draft article 2 reads as follows:

Use of terms

For the purposes of the present Convention:

(a) "Aquifer" means a permeable water-bearing rock formation capable of yielding exploitable quantities of water;

(b) "Aquifer system" means an aquifer or a series of aquifers, each associated with specific rock formations, that are hydraulically connected;

(c) "Transboundary aquifer system" means an aquifer system, parts of which are situated in different States;

(d) "Aquifer system State" means a State Party to the present Convention in whose territory any part of a transboundary aquifer system is situated.

97. As for case 5 of the annex to the addendum, he noted that the definitions of an aquifer and an aquifer system leave recharge and discharge areas outside aquifers. Since these areas should also be regulated for proper management of aquifers, he planned to formulate draft articles to regulate them, possibly in Part IV of his general framework.

98. As for Part II, general principles, which would contain a draft article on the principle governing uses of transboundary aquifer systems, the Special Rapporteur indicated that he required advice on the formulation of such a draft article. The two basic principles embodied in article 5 of the 1997 Convention, "equitable use" and "reasonable utilization" might not be appropriate for the Commission's endeavour. Although "equitable use" might have been deemed adequate for situations where a resource is "shared" in the true sense of the word, the resistance to the notion of "shared resource" in the case of groundwaters casts doubts as whether the principle of equitable use would prove politically acceptable. As regards the other principle of "reasonable utilization" which had the scientific meaning of "sustainable use", it was valid if the resource in question was renewable, yet in light of the fact that some groundwaters were not renewable the concept of sustainable use would be irrelevant. The States concerned would have to decide whether they wished to deplete the resource in a short or lengthy span of time. This raised the issue of objective criteria which could be applied to such situations, a matter on which the Special Rapporteur did not yet have answers.

99. As for another key principle, the obligation not to cause harm to other aquifer States, the Special Rapporteur referred to draft article 4,[325] paragraphs 1 and 2 which call for preventing

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[325] Ibid., draft article 4 reads as follows:

Obligation not to cause harm

> 1. Aquifer system States shall, in utilizing a transboundary aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer system States.
>
> 2. Aquifer system States shall, in undertaking other activities in their territories which have or are likely to have an impact on a transboundary aquifer system, take all appropriate measures to prevent the causing of significant harm through that system to other aquifer system States.

"significant harm" to other aquifer system States. Both in the Commission and in the Sixth Committee, the view had been expressed that a lower threshold than "significant harm" was required due to fragility of groundwaters. However, he had retained the threshold of significant harm, adopted in article 7 of the 1997 Convention and in article 3 of the draft articles on Prevention of transboundary harm from hazardous activities, since the concept of "significant" is flexible enough to safeguard the viability of aquifers.

100. As for the placement of paragraph 3 of draft article 4, which deals with the case where an aquifer system might be permanently destroyed, he thought it could be moved to Part IV.

101. The Special Rapporteur recalled that paragraph 4 mentioned the question of compensation but did not deal with liability per se. In relation to the proposal by some members of the Commission and some delegations in the Sixth Committee for the inclusion of an article on liability, the Special Rapporteur was of the view it was a matter best left for consideration by the Commission under the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

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3. Aquifer system States shall not impair the natural functioning of transboundary aquifer systems.

4. Where significant harm nevertheless is caused to another aquifer system State, the State whose activity causes such harm shall, in the absence of agreement to such activity, take all appropriate measures in consultation with the affected State to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

102. The Special Rapporteur stated that draft articles 5,[326] 6[327] and 7[328] were self-explanatory. He noted that regular exchange of data and information constituted a prerequisite for effective

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[326] Ibid., draft article 5 reads as follows:

General obligation to cooperate

1. Aquifer system States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain appropriate utilization and adequate protection of a transboundary aquifer system.

2. In determining the manner of such cooperation, aquifer system States are encouraged to establish joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.

[327] Ibid., draft article 6 reads as follows:

Regular exchange of data and information

1. Pursuant to article 5, aquifer system States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer system, in particular that of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer system, as well as related forecasts.

2. In the light of uncertainty about the nature and extent of some transboundary aquifer systems, aquifer system States shall employ their best efforts to collect and generate, in accordance with currently available practice and standards, individually or jointly and, where appropriate, together with or through international organizations, new data and information to more completely define the aquifer systems.

3. If an aquifer system State is requested by another aquifer system State to provide data and information that is not readily available, it shall employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer system States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other aquifer system States to which it is communicated.

[328] Ibid., draft article 7 reads as follows:

cooperation among aquifer system States and that paragraph 2 of draft article 6 had been formulated in view of the insufficiency of scientific findings of aquifer systems.

103. Draft article 7 related to the relationship between different kinds of uses of aquifer systems and followed the precedent of article 10 of the 1997 Convention. As regards the phrase "requirements of vital human needs" at the end of draft article 4, paragraph 2, he recalled that there was an understanding pertaining to this phrase which the Chairman of the Working Group of the Whole noted during the elaboration of the 1997 Convention. The understanding was that "in determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation".

2. Summary of the debate

104. Members commended the Special Rapporteur for his second report which, given the specialized nature of the topic, incorporated changes to terms in light of the availability of scientific data. Members also welcomed the assistance that he was getting from technical experts. Several members stated that further research was required, especially in relation to the interaction between groundwaters and other activities. Nonetheless, a query was raised as to the amount of additional technical information that was required prior to embarking upon the development of a legal framework.

105. The point was also made that the Commission should not overestimate the importance of groundwaters and that some of the groundwaters to be covered by the study could be located far beneath the surface where their very existence might not be clearly ascertained.

Relationship between different kinds of uses

1. In the absence of agreement or custom to the contrary, no use of a transboundary aquifer system enjoys inherent priority over other uses.

2. In the event of a conflict between uses of a transboundary aquifer system, it shall be resolved with special regard being given to the requirements of vital human needs.

106. Some concern was expressed about the assumption in paragraph 14 that the 1997 Convention had not adequately addressed some groundwater problems. A restrictive interpretation of the 1997 Convention was not something the Commission might wish to embark upon; the issues raised might possibly be dealt with through a new instrument, which would not necessarily be mandatory, or a protocol to the 1997 Convention.

107. Some members concurred with the Special Rapporteur that the focus of the work could not be limited to those groundwaters not covered by the 1997 Convention, while others considered it necessary to have a more detailed explanation of the groundwaters that would be excluded by the current endeavour.

108. As for the scope of the Commission's work, support was expressed for the position of the Special Rapporteur to exclude those aquifers which were not transboundary in nature. The point was also made that somewhere in the draft articles, reference should be made to those groundwaters which were excluded from the scope of the draft convention. On the other hand, the point was also made that it would be interesting to know the reasons why technical experts felt that all kinds of groundwaters, not just the transboundary ones, should be regulated. In addition, the question was also posed as to whether the international community ought to take an interest in ensuring that a State acted responsibly towards future generations of its own citizens with regard to a fundamental necessity of life such as water.

109. A view was expressed that the Commission had to determine the object of its endeavour. The exercise the Commission had embarked upon did not seem to entail the codification of State practice nor the progressive development of international law, but was rather legislative in nature. It was also stated that the primary purpose of the endeavour of the Commission was to establish the proper use of a natural resource, not to elaborate an environmental treaty or to regulate conduct.

110. The point was made that the report lacked a specific reference to the States where the groundwaters were formed, when it was precisely those States to whom the draft articles should be addressed.

111. The point was made that each State had a primary responsibility for the way it decided to use its groundwater resources, a responsibility which preceded State responsibility at the international level. Accordingly, the respective rules of conduct had to be adopted by States, by agreements between States and with the assistance of the international community, wherein regional arrangements would have a particular role. In this connection, reference was made to the approach taken by the countries of the Common Market of the Southern Cone (Mercosur), Argentina, Brazil, Paraguay and Uruguay, with regard to the Guarani Aquifer.

112. In this connection, it was recalled that article 2 of the 1997 Convention acknowledged the importance of the regional role, with its reference to "regional economic integration organization". Preference was thus voiced for the regional approach which did not deny fundamental principles such as the obligation not to cause harm, to cooperate and to use the resource rationally, principles that could certainly be reflected in the draft articles.

113. As an example of work carried out at the regional level, mention was made of the two Mercosur projects concerning the Guarani Aquifer: the first one was a technical study that considered issues such as access and potential uses, while the second project sought to establish the legal norms regulating the rights and duties of States under whose territories the resource was located. The Mercosur countries, it was noted, had considered certain elements regarding the Guarani Aquifer: groundwaters belonged to the territorial dominion of the State under whose soil they are located; groundwaters were those waters not connected with surface waters; the Guarani Aquifer was a transboundary aquifer belonging exclusively to the four Mercosur countries; they considered the development of the aquifer as a regional infrastructure integration project falling within its competencies as a regional economic integration organization. The Mercosur countries were focusing on preservation, controlled development and shared management of the Guarani Aquifer, in close cooperation with international organizations, but ownership, management and monitoring would remain the sole responsibility of the Mercosur countries themselves. Thus, two procedures would be taking place simultaneously. On the one hand, the Commission would pursue its codification while the regional arrangement concerning the Guarani Aquifer would go ahead at a more rapid pace; a two-way process of exchange of information would prove most useful.

114. However, the view was also expressed that a draft convention would not be incompatible with regional or national approaches to the matter. Furthermore, having the Commission state the general obligations of States with regard to groundwater management could encourage States to develop regional agreements.

115. It was emphasized that groundwaters must be regarded as belonging to the State where they were located, along the lines of oil and gas which had been recognized to be subject to sovereignty; it could not be considered a universal resource and the Commission's work should not convey the impression that groundwaters are subject to some special treatment different from that accorded to oil and gas. It was also suggested that the text could clearly state, possibly in the preamble, that the sovereignty over the groundwaters was in no way being questioned.

116. Some caution was urged in relying upon the 1997 Convention as the basis for the Commission's work on groundwaters, since that Convention was not yet in force and had a low number of signatures and ratifications. It was also stated that similar caution was warranted in relation to being guided by the draft articles on the prevention of transboundary harm from hazardous activities, since they had not yet been adopted by the General Assembly.

117. Support was expressed for the suggestion of the Special Rapporteur to elaborate a provision on a possible overlap between the 1997 Convention and the Commission's work on the subtopic.

118. It was noted that there had been scant response from States to the Commission's requests for information regarding the use and managements of transboundary groundwaters. The scarcity of State practice was considered another justification for a cautious approach to establishing a legal framework on the subtopic. However, the point was also made that the Commission should encourage the Special Rapporteur to pursue the topic since its mandate was not restricted to codifying existing practice.

119. Several members expressed their support for the term "transboundary" incorporated by the Special Rapporteur in his second report, since the prior use of the word "shared" had met with criticism. Nonetheless, it was also said that despite the use of the word "transboundary" the property connotation might not have been eliminated since the resource was indivisible and

was therefore "shared" with another State that also had rights. The incorporation of the word "aquifer" and the deletion of the word "confined", as suggested by the Special Rapporteur, were also supported.

120. It was suggested that an article could be drafted to highlight the three elements that constituted the scope of the draft convention; such a provision would set out the applicability of the draft convention to transboundary aquifer systems and to (a) the uses of; (b) activities which have or are likely to have an impact upon; and (c) measures of protection, preservation and management of, transboundary aquifer systems.

121. The point was raised as to whether the term "shared" should continue to be used in the title of the topic.

122. As regards the form which the final product of the Commission's endeavour should take, divergent views were expressed. The point was made that without sufficient State practice to rely on, a draft convention would not be acceptable to States and therefore, according to this view, it would be preferable to elaborate guidelines containing recommendations which could assist in drafting bilateral or regional conventions. Another suggestion was to elaborate a model law or a framework convention. Support was also expressed for the approach by the Special Rapporteur of preparing draft articles to assist the Commission in its work, leaving the issue of the final form for a later stage.

123. As for the general framework proposed by the Special Rapporteur in paragraphs 8 and 9 of the second report, it was stated that depending on the results of the research to be carried out, a revision might be warranted in the future.

124. In relation to draft article 1, some support was expressed for not restricting the application of the provisions to "uses", but also extending them to "other activities". Greater clarification was felt warranted for the terms "uses" and "activities". It was suggested to replace the word "uses" with "exploitation", a concept found in draft article 2 (a).

125. It was suggested that the object of the term "uses" should refer to groundwaters and not to "aquifers".

126. Some difficulty was voiced over the suggestion in paragraph 15 of the second report to use the phrase "which involve a risk of causing" instead of "which have or are likely to have" since the new wording would not apply to activities that currently had an impact on a transboundary aquifer system. Support was also expressed for the latter phrase which accommodated environmental concerns.

127. As for the definitions contained in draft article 2, it was felt that being technical in nature, they constituted a solid basis for discussion by the Commission. In relation to draft article 2 (a) clarification was required regarding two points. The first was whether the reference to exploitability should be interpreted solely in light of current technology or whether it implied that additional aquifers could fall within the ambit of the convention as technology developed. The second point was whether the concept of exploitability referred to quantities of water that could be used or to notions of commercial viability.

128. Furthermore, the issue was raised as to whether, given the definitions of draft article 2 and reading them in conjunction with paragraphs 2 and 3 of draft article 4, aquifer system States were obliged to protect aquifers that could be used in the future; appropriate protection for such aquifers was deemed warranted.

129. As for the definition of "aquifer system" contained in draft article 2 (b), the view was expressed that it was unclear why the aquifers had to be associated with specific rock formations since the fact that they were hydraulically connected would suffice.

130. The point was also made that the definition of "aquifer" might prove insufficient or imprecise in relation to obligations relating to the exploitation of the aquifer, thus requiring a definition of "aquifer waters".

131. With regard to the definition of "transboundary aquifer system", the query was made as to whether it would adequately cover the case of an aquifer located in a disputed territory, a situation which would require addressing the need for interim measures of protection to be adopted by the States concerned.

132. As for the principles that should govern the draft convention, mention was made of the need to include more principles than those contained in the 1997 Convention, especially in the area of environmental protection and the sustainable use of aquifers; the protection of vital

human needs was deemed to be one of the major principles that merited enunciation in the draft. Some principles related to oil and gas would need to be considered due to the exhaustible nature of the resource, although the point was also made that groundwaters could not be given the same treatment as oil and gas in light of their special characteristics. It was also stated that the principles of equitable and reasonable utilization and participation, contained in the 1997 Convention, should be integrated into the draft articles. Nonetheless, the point was also made that incorporation of those principles had to be approached with great caution, given the differences which existed between groundwaters and watercourses. Some of the queries raised by the Special Rapporteur in paragraph 23 required searching for relevant State practice.

133. As regards draft article 4, it was suggested that the order of paragraphs 1 and 2 should be inverted since the activities referred to in paragraph 2 might already have begun prior to the exploitation of the aquifer; furthermore it was stated that the preventive measures mentioned should also be applicable to States which, though not an aquifer system State per se, carry out activities that could have an impact on the aquifer, a point equally valid for paragraph 1 of draft article 5 and paragraph 3 of draft article 6.

134. In relation to the obligation not to cause harm, contained in draft article 4, paragraphs 1 and 2, it was noted that considerations of inter-generational equity and respect for environmental integrity warranted an obligation to prevent harm to the aquifer itself, and not to the aquifer State as the provisions suggested. In this connection it was suggested that draft articles 4 to 7 could only be discussed once the context had been adequately defined and the relevant principles developed.

135. In relation to the term "harm", it was noted that although useful, the term entailed a loose concept that required the presence of proof that a certain level of harm had been inflicted. Accordingly, the Commission should give further thought to identifying the types of harm it had in mind.

136. Furthermore, some concern was expressed that the present concept of "significant harm" would not be applicable to the problems posed by the non-sustainable use of groundwater, although draft article 4, paragraph 3, might constitute an attempt to deal with extraction rates. It was also noted that the concept of significant harm varied depending on different factors, such as the passage of time, the level of economic development, etc., and that it was preferable to avoid

defining significant harm, a matter which States could agree on at the regional level. The point was also raised that perhaps a lower threshold than significant harm was required, since groundwaters were much more vulnerable to pollution than surface waters.

137. It was stated that greater precision was called for in paragraph 3 of draft article 4 and that additional clarifications on the meaning of the term "impair" contained therein were required; the text of that paragraph seemed to cover a different situation than the one described in paragraph 27 of the report. It was also stated that the term "significant harm" should be incorporated into the provision.

138. It was also stated that some ambiguity existed in the notion of "measures" which could, inter alia, refer to the formation, protection and conservation of groundwaters.

139. In relation to the issues of liability and dispute settlement mechanisms, referred to in paragraph 28 of the second report, it was stated that compensation would probably never be an adequate remedy and that therefore prevention was critical. Accordingly, the commission might devise provisions to encourage States to act cooperatively, recognize their interdependence in respect of groundwater resources and identify means of obtaining assistance in the resolution of any disputes that might arise. It was also stated that a State which had impaired the functioning of a transboundary aquifer should be obliged to do more than merely discuss the question of compensation, as proposed in draft article 4, paragraph 4. In addition, the situation could raise the issue of responsibility if the impairment resulted from a wrongful act. According to another view, the issue of liability was, as suggested by the Special Rapporteur, best dealt with under the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

140. As concerns draft article 5, it was suggested that the obligation to cooperate in paragraph 1 include a specific reference to environmental protection and sustainable use. Suggestions were also made to explain the implication of the term "territorial integrity", contained in paragraph 1, though it was also noted that the term had been debated and included in article 8 of the 1997 Convention. Another suggestion made was to strengthen paragraph 2 of draft article 5.

141. In relation to draft article 6, paragraph 2, it was stated that its content seemed to be implicitly included in paragraph 1 of the same draft article, thus making it unnecessary; a provision similar to paragraph 2 was not found in the 1997 Convention. It also suggested that a provision regarding data and information vital to national defense and security could be incorporated, inspired perhaps by article 31 of the 1997 Convention.

142. As regards draft article 7, it was stated that the extent to which the vital human needs referred to in paragraph 2 would take precedence over the existence of an agreement or custom, referred to in paragraph 1, was not clear. According to another view, the two paragraphs could be merged, according primacy to vital human needs. It was noted that if a State was obliged to halt the exploitation of groundwater in order to address vital human needs, compensation would be due. However, the point was also made that vital human needs were not *jus cogens* and therefore could not override treaty obligations. Furthermore, a suggestion was made to allow the aquifer system States concerned to address the priority of uses.

3. Special Rapporteur's concluding remarks

143. As regards the serious difficulties posed by the scarcity of State practice, the Special Rapporteur indicated that he would do his best to extract such practice from the international cooperation efforts for the proper management of groundwaters, especially efforts undertaken at the regional level, and he acknowledged that most existing treaties only dealt with groundwaters in a marginal manner.

144. The Special Rapporteur stressed his full support for the importance of regional arrangements on groundwaters, arrangements which took due account of the historical, political, social and economic characteristics of the region. He indicated that the formulation of universal rules by the Commission would be designed to provide guidance for regional arrangements.

145. In relation to the final form of the Commission's work, divergent views had been expressed, but he hoped that a decision could be deferred until progress had been attained on major aspects of the substance. He reiterated that although the proposals in his report had been formulated as draft articles and that reference was frequently made to a draft convention, he did not preclude any possible form.

146. The Special Rapporteur welcomed the specific suggestions and questions by the members and indicated that some of them could be clarified with the assistance of experts.

147. He thought that the suggested reformulation of draft article 1 was most useful. He also felt that an aquifer which is not currently exploited but could be exploited in the future was covered by the definition.

148. With regard to the concept of groundwater, the Special Rapporteur explained that not all subterranean water was groundwater. The waters that remain in the unsaturated zone of rock formation, which eventually reach rivers or lakes or are reabsorbed by vegetation do not constitute groundwater, but are called interflow. Only waters which arrive at the saturated zone become groundwater. An aquifer therefore is a geological formation that contains sufficient saturated permeable material to yield significant quantities of water. He felt that a detailed explanation could be provided in the commentary.

149. The need for a definition of "transboundary", not only in relation to transboundary aquifers but also in relation to transboundary harm, merited due consideration.

150. The Special Rapporteur was not certain if a separate definition of "waters" might be required, since it could suffice to focus on the use of waters stored in rock formations.

151. With regard to the query as to why the harm to other States must be limited to harm caused through the aquifer system, the Special Rapporteur was of the view that other harm, such as the one caused through the atmosphere, would be covered by the work being carried out under the topic of "International liability".

152. As to the relationship between impairing the functioning of an aquifer system, referred to in paragraph 3 of draft article 4, and the permanent destruction of aquifers, his understanding was that when an aquifer was exploited beyond a certain level, the rock formation lost its capacity to yield water; therefore, it would no longer be an aquifer as defined in draft article 2.

153. As regards the no harm clause, several members had referred to the question of "significant harm" from different perspectives. The Special Rapporteur recalled the extensive history of debate surrounding this concept in the Commission, which had finally agreed to the

term "significant harm" during the adoption of the second reading of the draft articles on the law of non-navigational uses of international watercourses. The understanding then had been that harm was "significant" if it was not minor or trivial, but that it was less than "substantial" or "serious". The Commission also took the same position when it adopted draft article 3 on the prevention of transboundary harm. Furthermore, he recalled that the Commission had recommended the threshold of significant harm to the General Assembly twice on similar projects and that a compelling reason would thus be required to modify the threshold. He welcomed any alternative suggestion in this regard.

154. In relation to draft article 2 (b), he concurred with the suggestion that the phrase "each associated with specific rock formation" could be dispensed with, since it was a scientific description of an aquifer system that had no legal consequence.

155. As regards the question of the scope of the 1997 Convention, the Special Rapporteur was of the view that the Commission, as the drafter of the instrument, was called to provide such an answer.

156. Several members had referred to the relationship between different kinds of uses in draft article 7. The Special Rapporteur felt that this article depended on the final outcome of the principle governing the uses of aquifer systems. He did not consider paragraph 2 as an exception to paragraph 1. Paragraph 2 would mean that in case of a conflict between the extraction of water for drinking purposes and for recreational purposes, the former should be accorded priority.

157. The Special Rapporteur also stated that he would refer to and if appropriate take into account the water rules which the International Law Association would be finalizing in August 2004.

CHAPTER VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

158. The Commission, at its thirtieth session, in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter, Special Rapporteur.[329]

159. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.[330] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission, in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission, in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.[331]

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[329] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

[330] For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

[331] The Commission, at the same thirty-sixth session, also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline, *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378 and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". *Yearbook ... 1985*, vol. II (Part One), Addendum,

160. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996).[332]

161. At its forty-fourth session, in 1992, the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[333] On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages: first completing work on prevention of transboundary harm and subsequently proceeding with remedial measures.[334] The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

162. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to

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document A/CN.4/384. See also "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ...1995*, vol. II (Part One), document A/CN.4/471.

[332] For the 12 reports of the Special Rapporteur, see: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394; *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402; *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405; *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413; *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423; *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428; *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437; *Yearbook ... 1992*, vol. II (Part One), p. 75, document A/CN.4/443; *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450; *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475 and Add.1.

[333] *Yearbook ... 1992*, vol. II (Part Two), para. 281.

[334] Ibid., paras. 341-349. For a detailed recommendation of the Commission see ibid., ... 1995, chap. V.

the Commission. The Working Group submitted a report,[335] which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

163. At its forty-ninth session, in 1997, the Commission established a Working Group to consider how the Commission should proceed with its work on this topic. It reviewed the work of the Commission on the topic since 1978, noting that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the two issues dealt with under the topic, namely "prevention" and "international liability" were distinct from one another, though related. The Working Group therefore agreed that henceforth these issues should be dealt with separately.

164. Accordingly, the Commission decided to proceed with its work on the topic, dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[336] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[337] The Commission, from its fiftieth (1998) to its fifty-second session (2000), received three reports from the Special Rapporteur.[338]

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[335] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/51/10), Annex.

[336] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 168.

[337] Ibid.

[338] A/CN.4/487 and Add.1; A/CN.4/501 and A/CN.4/510. The Commission also had before it comments and observations from Governments, A/CN.4/509 and A/CN.4/516, the latter being received in 2001.

165. At its fiftieth session, in 1998, the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary harm from hazardous activities.[339] At the fifty-third session, in 2001, it adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,[340] thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

166. The General Assembly, in operative paragraph 3 of resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

167. At its fifty-fourth session, in 2002, the Commission resumed its consideration of the second part of the topic and established a Working Group to consider the conceptual outline of the topic. The report of the Working Group set out some initial understandings on the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)", presented views on its scope and the approaches to be pursued. The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.[341]

168. At its fifty-fifth session, in 2003, the Commission considered the first report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/531) and established an open-ended working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission.

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[339] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 52.

[340] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

[341] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 441.

B. Consideration of the topic at the present session

169. At the present session, the Commission had before it the second report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/540). The report analysed comments of States on the main issues concerning allocation of loss. It drew general conclusions in the light of the said comments as well as previous debates in the Commission. In his report, the Special Rapporteur also submitted a set of 12 draft principles.[342] The Commission considered the report at its

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[342] The set of the draft principles proposed by the Special Rapporteur read as follows:

1. Scope of application

The present draft principles apply to damage caused by hazardous activities coming within the scope of the draft articles on prevention of transboundary harm from hazardous activities, namely activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

2. Use of terms

For the purposes of the present draft articles:

(a) "Damage" means significant damage caused to persons, property or the environment; and includes:

(i) Loss of life or personal injury;

(ii) Loss of, or damage to, property other than the property held by the person liable in accordance with these articles;

(iii) Loss of income from an economic interest directly deriving from an impairment of the use of property or natural resources or environment, taking into account savings and costs;

(iv) The costs of measures of reinstatement of the property, or natural resources or environment, limited to the costs of measures actually taken;

(v) The costs of response measures, including any loss or damage caused by such measures, to the extent of the damage that arises out of or results from the hazardous activity;

(b) "Damage to the environment" means loss or damage by impairment of the environment or natural resources;

(c) "Environment" includes: natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape;

(d) "Hazardous activity" means an activity that has a risk of causing significant or disastrous harm;

(e) "Operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs and may include a parent company or other related entity whether corporate or not;

(f) "Transboundary damage" means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State of origin or in other places beyond the jurisdiction or control of any State including the State of origin, whether or not the States or areas concerned share a common border;

(g) "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment, or where this is not possible, to introduce, where appropriate, the equivalent of these components into the environment. Domestic law may indicate who will be entitled to take such measures;

(h) "Response measures" means any reasonable measures taken by any person, including public authorities, following the occurrence of the transboundary damage, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up. Domestic law may indicate who will be entitled to take such measures;

(i) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out;

(j) "State of injury" means the State in the territory or otherwise under the jurisdiction or control of which transboundary damage occurs;

(k) "State likely to be affected" means the State or States in the territory of which there is a risk of significant transboundary harm, or the State or States which have jurisdiction or control over any other place which is exposed to the risk of such harm;

(l) "States concerned" means the State of origin, the State likely to be affected and the State of injury.

3. Compensation of victims and protection of environment

1. The main objective of the present principles is to ensure that victims are not left entirely on their own, within the limits prescribed under national law, to bear the loss that they may suffer due to transboundary damage.

2. The objective is also to ensure that any transboundary damage to environment or natural resources even in areas or places beyond the jurisdiction or control of States arising from the hazardous activities is compensated within the limits and under conditions specified in these principles.

4. Prompt and adequate compensation

Alternative A

1. The State of origin shall take necessary measures to ensure that prompt and adequate compensation is available for persons in another State suffering transboundary damage caused by a hazardous activity located within its territory or in places under its jurisdiction or control.

2. The State of origin shall also take necessary measures to ensure that such prompt and adequate compensation is available for transboundary damage to the environment or natural resources of any State or of the areas beyond the jurisdiction and control of any State arising from the hazardous activity located within its territory or in places under its jurisdiction or control.

3. Measures referred to in paragraphs 1 and 2 above may be subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.

4. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity.

Alternative B

1. The operator of a hazardous activity located within the territory or in places within the jurisdiction and control of a State shall be liable for the transboundary damage caused by that activity to persons or environment or natural resources within the territory or in places under the jurisdiction and control of any other State or to environment or natural resources in areas beyond the jurisdiction and control of any State.

2. The liability of the operator is subject to applicable conditions, limitations or exceptions under the law of the State of origin which authorized the activity.

3. When considering evidence of the causal link between the hazardous activity and the transboundary damage, [due] account shall be taken of the risk of causing significant damage inherent in the hazardous activity.

5. Supplementary compensation

1. The States concerned shall take the necessary measures to establish supplementary funding mechanisms to compensate victims of transboundary damage who are unable to obtain prompt and adequate compensation from the operator for a [legally] established claim for such damage under the present principles.

2. Such funding mechanisms may be developed out of contributions from the principal beneficiaries of the activity, the same class of operators, earmarked State funds or a combination thereof.

3. The States concerned shall establish criteria for determining insufficiency of compensation under the present draft principles.

6. Insurance and financial schemes

The States concerned shall take the necessary measures to ensure that the operator establishes and maintains financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

7. Response action

1. States shall require all operators involved in the conduct of activities falling within the scope of the present principles to take prompt and effective action in response to any incident involving such activities with a view to minimizing any damage from the incident, including any transboundary damage. Such response action shall include prompt notification, consultation and cooperation with all potentially affected States.

2. In the event that the operator fails to take the required prompt and effective response action the State of origin shall, where appropriate, in consultation with the States likely to be affected, make arrangements for such action.

8. Availability of recourse procedures

1. The States concerned shall ensure the availability of prompt, adequate and effective administrative and judicial remedies to all the victims of transboundary damage arising from the operation of hazardous activities.

2. States shall ensure that such remedies are no less prompt, adequate and effective than those available to their nationals and include access to such information as is necessary to exercise their right of access to compensation.

3. Each State shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

2804th, 2805th, 2807th, 2808th and 2809th meetings on 26 and 27 May and 1, 2 and 3 June 2004. The Commission also had, as an informal document, the Survey of Liability Regimes relevant to the topic, updated by the Secretariat.[343]

9. Relationship with other rules of international law

The present set of principles is without prejudice to rights and obligations of the Parties under the rules of general international law with respect to the international responsibility of States.

10. Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. For a dispute not resolved in accordance with paragraph 1, parties may by mutual agreement accept either or both of the means of dispute settlement, that is, (a) submission of the dispute to the International Court of Justice or (b) arbitration.

11. Development of more detailed and specific international regimes

1. States shall cooperate in the development of appropriate international agreements on a global or regional basis in order to prescribe more detailed arrangements regarding the prevention and response measures to be followed in respect of a particular class of hazardous activities as well as the insurance and compensation measures to be provided.

2. Such agreements may include industry- and/or State-funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including insurance, are insufficient to cover the losses suffered as result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

12. Implementation

1. States shall adopt any legislative, regulatory and administrative measures that may be necessary to implement the above provisions.

2. These provisions and any implementing provisions shall be applied among all States without discrimination based on nationality, domicile or residence.

3. States shall cooperate with each other to implement the provisions according to their obligations under international law.

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[343] Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), to be issued as document A/CN.4/543.

170. At its 2809th meeting, held on 3 June 2004, the Commission established a working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to examine the proposals submitted by the Special Rapporteur, taking into account the debate in the Commission, with view to recommending draft principles ripe for referral to the Drafting Committee, while also continuing discussions on other issues, including the form that work on the topic should take. The Working Group held six meetings, on 4 June, and on 6, 7 and 8 July 2004. In its work the Working Group reviewed and revised the 12 draft principles submitted by the Special Rapporteur and it recommended that the 8 draft principles contained in its report (A/CN.4/661 and Corr.1) be referred to the Drafting Committee.

171. At its 2815th meeting, held on 9 July 2004, the Commission received the oral report of the Chairman of the Working Group and decided to refer the eight draft principles to the Drafting Committee. The Commission also requested the Drafting Committee to prepare a text of a preamble.

172. At its 2822nd meeting, held on 23 July 2004, the Commission considered the report of the Drafting Committee and adopted on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (see section C below).

173. At its 2828th meeting, held on 4 August 2004, the Commission decided, in accordance with articles 16 and 21 of its statute to transmit the draft principles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

174. At its 2829th meeting, held on 5 August 2004, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft principles on the liability aspect of the topic.

C. Text of draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission on first reading

1. Text of the draft principles

175. The text of the draft principles adopted by the Commission on first reading is reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*

The General Assembly,

Recalling principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling also the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with the provisions of the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious losses,

Concerned that appropriate and effective measures should be in place to ensure, as far as possible, that those natural and legal persons, including States, that incur harm or loss as a result of such incidents should be able to obtain prompt and adequate compensation,

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* The Commission reserves the right to reconsider the matter of the final form of the instrument at the second reading in the light of the comments and observations of Governments. In the event that the Commission has to prepare a draft framework convention, the exercise would entail some textual changes to draft principles 4 to 8 and a few additions, especially with regard to the resolution of disputes and the relationship between the draft convention and other international instruments.

Noting that States shall be responsible for infringements of their obligations of prevention under international law,

Recognizing the importance of international cooperation among States,

Recalling the existence of international agreements covering specific categories of hazardous activities,

Desiring to contribute to the further development of international law in this field;

...

Principle 1

Scope of application

The present draft principles apply in relation to transboundary damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Principle 2

Use of terms

For the purposes of the present draft principles:

(a) "Damage" means significant damage caused to persons, property or the environment; and includes:

(i) Loss of life or personal injury;

(ii) Loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) Loss or damage by impairment of the environment;

(iv) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) The costs of reasonable response measures;

(b) "Environment" includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

(c) "Transboundary damage" means damage caused in the territory or in other places under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft principle 1 are carried out;

(d) "Hazardous activity" means an activity which involves a risk of causing significant harm through its physical consequences;

(e) "Operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Principle 3

Objective

The present draft principles aim at ensuring prompt and adequate compensation to natural or legal persons, including States, that are victims of transboundary damage, including damage to the environment.

Principle 4

Prompt and adequate compensation

1. Each State should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability should be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, these measures should include the requirement for the establishment of industry wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State should also ensure that additional financial resources are allocated.

Principle 5

Response measures

With a view to minimizing any transboundary damage from an incident involving activities falling within the scope of the present draft principles, States, if necessary with the assistance of the operator, or, where appropriate, the operator, should take prompt and effective response measures. Such response measures should include prompt notification and, where appropriate, consultation and cooperation with all potentially affected States.

Principle 6

International and domestic remedies

1. States should provide appropriate procedures to ensure that compensation is provided in furtherance of draft principle 4 to victims of transboundary damage from hazardous activities.

2. Such procedures may include recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

3. To the extent necessary for the purpose of providing compensation in furtherance of draft principle 4, each State should ensure that its domestic administrative and judicial mechanisms possess the necessary competence and provide effective remedies to such victims. These mechanisms should not be less prompt, adequate and effective than those available to its nationals and should include appropriate access to information necessary to pursue such mechanisms.

Principle 7

Development of specific international regimes

1. States should cooperate in the development of appropriate international agreements on a global, regional or bilateral basis in order to make arrangements regarding the prevention and response measures to be followed in respect of particular categories of hazardous activities as well as the compensation and financial security measures to be taken.

2. Such agreements may include industry and/or State funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the losses suffered as result of an incident. Any such funds may be designed to supplement or replace national industry based funds.

Principle 8

Implementation

1. Each State should adopt any legislative, regulatory and administrative measures that may be necessary to implement the present draft principles.

2. The present draft principles and any implementing provisions should be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles consistent with their obligations under international law.

2. Text of the draft principles with commentaries thereto

176. The text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities with commentaries thereto adopted by the Commission on first reading at its fifty-sixth session, are reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*

General commentary

(1) The background to these draft principles, together with the underlying approach, is outlined in the preamble. It places the draft principles in the context of the relevant provisions of the Rio Declaration on Environment and Development but then specifically recalls the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities.

(2) It briefly provides the essential background that, even if the relevant State fully complies with its prevention obligations under those draft articles, accidents or other incidents may nonetheless occur and have transboundary consequences that cause harm and serious loss to other States and their nationals.

(3) It is important, as the preamble records, that those who suffer harm or loss as a result of such incidents involving hazardous activities are not left to carry those losses and are able to obtain prompt and adequate compensation.

(4) These draft principles establish the means by which this may be accomplished.

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* The Commission reserves the right to reconsider the matter of the final form of the instrument at the second reading in the light of the comments and observations of Governments. In the event that the Commission has to prepare a draft framework convention, the exercise would entail some textual changes to draft principles 4 to 8 and a few additions, especially with regard to the resolution of disputes and the relationship between the draft convention and other international instruments.

(5) As the preamble notes the necessary arrangements for compensation may be provided under international agreements covering specific hazardous activities and the draft principles encourage the development of such agreements at the international, regional or bilateral level as appropriate.

(6) The draft principles are therefore intended to contribute to the further development of international law in this field both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements and by indicating the matters that should be dealt with in such agreements.

(7) The preamble also makes the point that States are responsible under international law for complying with their prevention obligations. The draft principles are therefore without prejudice to the rules relating to State responsibility and any claim that may lie under those rules in the event of a breach of the obligations of prevention.

(8) In preparing the draft principles, the Commission has proceeded on the basis of a number of basic understandings. In the first place, there is a general understanding that (a) the legal regime should be general and residual in character; and (b) that such a regime should be without prejudice to the relevant rules of State responsibility adopted by the Commission in 2001.[344] Secondly, there is an understanding that the scope of the liability aspects should be the same as the scope of the draft articles on prevention of transboundary harm from hazardous activities, which the Commission also adopted in 2001.[345] In particular, it is also agreed that to trigger the regime governing transboundary damage, the same threshold, "significant", that is made applicable in the case of transboundary harm be employed. The Commission also carefully considered the desirability of examining the issues concerning global commons. After observing that the issues associated with that topic are different and have their own particular features, the Commission came to the conclusion that they require a separate treatment.[346] Thirdly, there is

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[344] For the text and commentaries of the articles on responsibility of States for Internationally wrongful acts, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77.

[345] Ibid., para. 98.

[346] See also ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 447.

also agreement to proceed on the basis of certain policy considerations: (a) that while the activities contemplated for coverage under the present topic are essential for economic development and beneficial to society, the regime should provide for prompt and adequate compensation for the innocent victims in the event that such activities give rise to transboundary damage; and (b) that contingency plans and response measures should be in place over and above those contemplated in the draft articles on prevention.

(9) Fourthly, the various existing models of liability and compensation have confirmed that State liability is an exception and accepted essentially in the case of outer space activities. Accordingly, there is also general agreement that liability for activities falling within the scope of the present draft principles should be attached primarily to the operator; and that such liability would be without requiring proof of fault, and may be limited or subject to exceptions, taking into account social, economic and other policy considerations. However, it is equally recognized that such liability need not always be placed on the operator of a hazardous or a risk bearing activity. The important point is that the person most in command or other persons or entities as appropriate may also be held liable.

(10) Fifthly, it may be noted that there is a consensus in favour of providing for supplementary funding in any scheme of allocation of loss and that such funding would be particularly important if the concept of limited liability is adopted. The basic understanding is to adopt a scheme of allocation of loss, spreading the loss among multiple actors, including the State. In view of the general and residual character, it is not considered necessary to predetermine the shares of different actors and precisely identify the role to be assigned to the State. It is at the same time recognized that the State has, under international law, duties of prevention and these entail certain minimum standards of due diligence.[347] States are obliged in accordance with such duties to allow hazardous activities with a risk of significant transboundary harm only upon prior authorization, utilizing environmental and transboundary impact

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[347] Birnie and Boyle have observed in respect of the draft articles on prevention that "… there is ample authority in treaties and case law, and State practice for regarding … provisions of the Commission's draft convention as codification of existing international law. They represent the minimum standard required of States when managing transboundary risks and giving effect to Principle 2 of the Rio Declaration", Patricia Birnie and Alan Boyle, International Law and The Environment (Oxford, 2002) (2nd ed.), p. 113.

assessments, as appropriate, to evaluate applications for authorization and determine appropriate monitoring arrangements to monitor the same. The attachment of primary liability on the operator, in other words, does not in any way absolve the State from discharging its own duties of prevention under international law.

(11) Sixthly, there is broad agreement on the basic elements to be incorporated in the regime governing the scheme of allocation of loss in case of damage arising from hazardous activities. It is understood that in most cases the substantive or applicable law to resolve compensation claims may involve either civil liability or criminal liability or both, and would depend on a number of variables. Principles of civil law, or common law or private international law governing choice of forums as well as applicable law may come into focus depending upon the context and the jurisdiction involved. Accordingly, the proposed scheme is not only general and residual but also flexible without any prejudice to the claims that might arise and the applicable law and procedures.

(12) Finally, on the form of instrument, different views have been advanced at this stage. On the one hand, it has been suggested that they should be cast as draft articles and thereby be a counterpart in form as well as substance to the draft articles on prevention.

(13) On the other hand, it has been pointed out that, as they are inevitably general and residual in character, they are more appropriately cast as draft principles. The different characteristics of particular hazardous activities may require the adoption of different approaches with regard to specific arrangements. In addition, the choices or approaches adopted may vary under different legal systems. Further, the choices and approaches adopted and their implementation may also be influenced by different stages of economic development of the countries concerned.

(14) On balance, the Commission concluded that recommended draft principles would have the advantage of not requiring a potentially unachievable harmonization of national laws and legal systems. It is also of the view that the goal of widespread acceptance of the substantive provisions is more likely to be met if they are cast as recommended draft principles. But as noted in the footnote to the title, the Commission has reserved the right to reconsider the matter of the final form of the instrument at the second reading in the light of the comments and observations of Governments.

Preamble

The General Assembly,

Recalling Principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling also the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with the provisions of the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious losses,

Concerned that appropriate and effective measures should be in place to ensure, as far as possible, that those natural and legal persons, including States, that incur harm or loss as a result of such incidents should be able to obtain prompt and adequate compensation,

Noting that States shall be responsible for infringements of their obligations of prevention under international law,

Recognizing the importance of international cooperation among States,

Recalling the existence of international agreements covering specific categories of hazardous activities,

Desiring to contribute to the further development of international law in this field;

...

Commentary

(1) In the past the Commission has generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. However, there have also been precedents during which the Commission has submitted a draft preamble. This was the case with respect to the two Draft Conventions on the Elimination of Future Statelessness and on the Reduction of the Future Statelessness, the Draft articles on the nationality of natural persons in relation to the succession of States, as well as with respect to the draft articles on prevention.

(2) As noted in the introduction, the first preambular paragraph commences with a reference to Principles 13 and 16 of the Rio Declaration on Environment and Development.[348] The need to develop national law regarding liability and compensation for the victims of pollution and other environmental damage is stressed in Principle 13 of that Declaration, which reiterates Principle 22 of the Stockholm Declaration on the Human Environment. Principle 16 of the Rio Declaration addresses the promotion of internalization of environmental costs, taking into account the polluter pays principle.

(3) The second preambular paragraph is self-explanatory. It links the present draft principles to the draft articles on prevention. The third, fourth, and fifth preambular paragraphs seek to provide the essential rationale for the present draft principles.

(4) The sixth preambular paragraph stresses that these draft principles do not affect the responsibility that a State may incur as a result of infringement of its preventive obligations under international law.

(5) The last three preambular paragraphs are self-explanatory. The seventh preambular paragraph recognizes the importance of international cooperation in this field. The eighth preambular paragraph recognizes the existence of specific international agreements for various categories of hazardous activities. The last preambular paragraph highlights the importance of the present exercise to further advance the development of international law in this field.

Principle 1

Scope of application

> The present draft principles apply in relation to transboundary damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

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[348] *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and Corrigenda), vol. I: *Resolutions adopted by the Conference, resolution 1, annex I.*

Commentary

(1) The draft principle on the scope of application is drafted to reflect the agreement to maintain the scope of the 2001 draft articles on prevention of transboundary harm from hazardous activities for the present principles on transboundary damage also. The interrelated nature of the concepts of "prevention" and "liability" needs no particular emphasis in the context of the work of the Commission.[349] Draft principle 1 identifies that the focus of the present principles is transboundary damage. The notion of "transboundary damage", like the notion of "transboundary harm", focuses on damage caused in the jurisdiction of one State by activities situated in another State.

(2) In the first instance, activities coming within the scope of the present draft principles are those that involve "the risk of causing significant transboundary harm through their physical consequences". Different types of activities could be envisaged under this category. As the title of the draft principles indicates, any hazardous or ultra-hazardous activity, which involves, at a minimum, a risk of significant transboundary harm is covered. An ultra-hazardous activity is perceived to be an activity though normally well managed to remain safe, with a possibility to materialize in damage of grave (more than significant, serious or substantial) proportions, on the rare occasion when it happens.

(3) Suggestions have been made at different stages of the evolution of the topic on international liability to specify a list of activities with an option to add or delete items to such a list. As with the draft articles on prevention, the Commission opted to dispense with such specification. Such specification of a list of activities is not without problems and functionally it is not considered essential. Any such list of activities is likely to be under-inclusive and would quickly need review in the light of ever evolving technological developments. Further, except for certain ultra-hazardous activities which are mostly the subject of special regulation, e.g., in the nuclear field or in the context of activities in outer space, the risk that flows from an activity is primarily a function of the application of particular technology, the specific context and the

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[349] See the recommendation of the 2002 Working Group of the Commission, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 and corrigendum* (A/57/10 and Corr.1), paras. 447-448.

manner of operation. It is felt that it is difficult to capture these elements in a generic list. However, the activities coming within the scope of the present draft principles are already the subject of the requirement of prior authorization under the draft articles on prevention.

(4) Moreover, it is always open to States to specify activities coming within the scope of the present draft principles through multilateral, regional or bilateral arrangements or to do so in their national legislation.[350]

(5) The phrase "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences" has a particular meaning, which is well understood as containing four elements, namely (a) such activities are not prohibited by international law; (b) such activities involve a risk of causing significant harm, (c) such harm must be transboundary; and (d) the transboundary harm must be caused by such activities through their physical consequences. All these elements - the element of human causation; the risk element; the (extra-)territorial element; and the physical element - as adapted from, and explained in the context of, the draft articles on prevention have been preserved.[351]

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[350] For example, various liability regimes deal with the type of activities which come under their scope: the 1992 Convention on the Protection of Marine Environment of the Baltic Sea Area, [IMO 1] LDC.2/Circ.303; the 1992 Convention on the Transboundary Effects of Industrial Accidents (document ENVWA/R.54 and Add.1), reprinted in *31 ILM* (1992), p. 1333; annex I to the 2003 Protocol on Civil Liability and compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003 Kiev Protocol), UNECE document MP/WAT/2003/1-CP.TEIA/2003/3 of 11 March 2003; annex II to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) (*European Treaty Series*, No. 150. See also *32 ILM* (1993) 128), where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities; this Convention also has a list of dangerous substances in annex I. See also Directive 2004/35/CE of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143/56. 30.4.2004. Volume 47).

[351] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, commentary to draft art. 1.

(6) This particular phrase "activities not prohibited by international law" has been adopted essentially to distinguish the operation of the present draft principles from the operation of the rules governing State responsibility. The Commission recognized the importance, not only of questions of responsibility for internationally wrongful acts, but also questions concerning the obligation to make good any harmful consequences arising out of certain activities, especially those which, because of their nature, present certain risks. However, in view of the entirely different basis of liability for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, the Commission decided to address the two subjects separately.[352] That is, for the purpose of the draft principles, the focus is on the consequences of the activities and not on the lawfulness of the activity itself.

(7) The present draft principles, like the draft articles on prevention, are concerned with primary rules. Accordingly, the non-fulfilment of the duty of prevention prescribed by the draft articles on prevention could engage State responsibility without necessarily giving rise to the implication that the activity itself is prohibited.[353] In such a case, State responsibility could be

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[352] *Yearbook of the International Law Commission* … 1973, vol. II, para. 38.

[353] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/56/10), para. 98, commentary to art. 1, para. (6), p. 382. See also M.B. Akehurst "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 3-16; Alan E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?", *International and Comparative Law Quarterly*, vol. 39 (1990), pp. 1-25; Karl Zemanek, "State Responsibility and Liability", in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (1991), p. 197; P.S. Rao, the Second Report on Prevention of Transboundary Damage from Hazardous Activities, document A/CN.4/501, paras. 35-37. J. Barboza, "La responsabilité 'causale' à la Commission du droit international", *A.F.D.I.*, 1988, pp. 513-522; P. Cahier, "Le problème de la responsabilité pour risque en droit international", in *I.U.H.E.I.*, les relations internationales dans un monde en mutation, Sijthoff Leyden, 1977, pp. 409-434; C-G. Laubet, "Le droit internationale enquête d'une responsabilité pour les dommages résultant d'activités qu'il n'interdit pas", *A.F.D.I.*, 1983, pp. 99-120; D. Levy, "Responsabilité pour omission et responsabilité pour risque en droit international public", *R.G.D.I.P.*, 1961, pp. 744-764; P. Strurma, "La responsabilité en dehors de l'illicite en droit international économique", *P.Yb.I.L.*, 1993, pp. 91-112.

invoked to implement not only the obligations of the State itself but also the civil responsibility or duty of the operator.[354] Indeed, this is well understood throughout the work on draft articles on prevention.[355]

(8) It is recognized that harm could occur despite implementation of the duties of prevention. Transboundary harm could occur for several other reasons not involving State responsibility. For instance, there could be situations where the preventive measures were followed but in the event proved inadequate or where the particular risk that caused transboundary harm could not be identified at the time of initial authorization and hence appropriate preventive measures were not envisaged.[356] In other words, transboundary harm could occur accidentally or it may take place in circumstances not originally anticipated. Further, damage could occur because of gradually accumulated adverse effects over a period of time. This distinction ought to be borne in mind for purposes of compensation. Because of problems of establishing a causal link between the hazardous activity and the damage incurred, claims in the latter case are not commonplace.[357]

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[354] See P.M. Dupuy, La responsabilité internationale des États pour les dommages d'origine techologique et industrielle (Paris, Pedone, 1977), p. 319; I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (1983), p. 50; A. Rosas, "State Responsibility and Liability under Civil Liability Regimes", in O. Bring and Said Mahmoudi (eds.), *Current International Law Issues: Nordic Perspectives* (Essays in honour of Jerzy Sztucki) (M. Nijoff, Boston, 1994); and Fouad Bitar "Les mouvements transfrontaliers de déchets dangereux selon la Convention de Bâle", *Etude des régimes de responsabilité* (Paris, Pedone, 1997), pp. 79-137. However, different standards of liability, burden of proof and remedies apply to State responsibility and liability. See also P.M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?" in *Revue générale de droit international public* (1997-4), pp. 873-903; Teresa A. Berwick, "Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes", *Georgetown International Environmental Review* (1998), pp. 257-267; and "A propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l'environnement", in *Les Hommes et l'environnement en hommage à Alexandre Kiss* (Paris, Frison-Roche, 1998).

[355] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 443.

[356] Ibid., para. 444.

[357] See Peter Wetterstein "A Proprietary or Possessory Interest: A Condition sine qua non for claiming damage for environmental impairment, in Peter Wetterstein, *Harm to the Environment:*

(9) The focus of the present draft principles is on damage caused, irrespective of the fulfilment of duties of due diligence as set out in the draft articles on prevention. However, where there is failure of performance of those due diligence obligations on the part of the State of origin, claims concerning State responsibility for wrongful acts may also be made in addition to claims for compensation envisaged by the present draft principles.

(10) The second criterion is that activities covered in these draft principles are those that originally carried a "risk of causing significant transboundary harm". The expression "risk of causing significant transboundary harm", as defined in the commentary to article 2 (a) of the draft articles on prevention, "encompasses a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm".[358] Thus, the term refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" producing an effect that is deemed significant.

(11) The term "significant" is understood to refer to *something more than "detectable" but need not be at the level of "serious" or "substantial"*.[359] The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards. The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories, States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable and do not fall within the scope of the present draft principles.

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the Right to Compensation and Assessment of Damage, Clarendon Press, Oxford (1997), p. 30. See also Xue Hanquin, Transboundary Damage in International Law, Cambridge University Press, 2003, pp. 19-105 and 113-182.

[358] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, para. 1 of the commentary to art. 2, p. 387.

[359] Ibid., paras. 4 and 5, p. 388.

(12) The third criterion is related to the transboundary nature of the damage caused by the activities concerned. "Transboundary damage" is defined in draft principle 2. It links transboundary damage to the territory or other places under the jurisdiction or control of a State other than the State in which the activity it carried out. Thus three concepts are covered by this criterion, namely "territory, jurisdiction" and "control". These concepts are defined in the draft articles on prevention.[360] The activities must be conducted in the territory or otherwise under the jurisdiction or control of one State and have an impact in the territory or in other places under the jurisdiction or control of another State.

(13) The fourth criterion to delimit the scope of the topic is that the significant transboundary harm must have been caused by the "physical consequences" of activities in question. Thus, transboundary harm caused by State policies in monetary, socio-economic or similar fields is excluded from the scope of the topic.[361]

(14) Finally, the draft principles are concerned with "damage caused" by hazardous activities. In the present context, the reference to the broader concept of transboundary harm has been retained where the reference is only to the risk of harm and not to the subsequent phase where harm has actually occurred. The term "damage" is employed to refer to the latter phase. The notion of "damage" is introduced to denote specificity to the transboundary harm, which occurred. The term also has the advantage of familiarity. It is the usual term used in liability regimes.[362] The word "transboundary" qualifies "damage" to stress the transboundary

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[360] Ibid., para. 98, paras. 7-12 of commentary to art. 1, pp. 383-385.

[361] Ibid., paras. 16 and 17, p. 386.

[362] Damage is defined in art. 2, para. 2 (c) of the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and Their Disposal (document UNEP-CHW.5/29); art. 2, para. 2 (d) of the 2003 Kiev Protocol ; art. 2, para. 7 of the 1993 Lugano Convention; art. 1, para. 6 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) (IMO document LEG/CONF.10/8/2. See also *35 ILM* (1996) 1415); art. 1, para. 10 of the 1989 Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (document ECE/TRANS/79, for text see also *Revue de droit uniforme* (UNIDROIT) 1989 (I), p. 280). See also art. 2, para. 2 of the 2004 European Parliament and the Council Directive 2004/35/CE on environmental liability with regard to prevention and remedying

orientation pursued for the scope of the present draft principles. The phrase "in relation to transboundary damage" is intended to emphasize the broad range of issues concerning damage, which the present draft principles address and these go beyond the principle of prompt and adequate compensation.

Principle 2

Use of terms

For the purposes of the present draft principles:

(a) "Damage" means significant damage caused to persons, property or the environment; and includes:

(i) Loss of life or personal injury;

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of environmental damage (OJ L 143/56. 30.4.2004. Volume 47); and art. I (a) of the 1972 Convention on International Liability for Damage Caused by Space Objects of 1972 (United Nations, *Treaty Series*, vol. 961, p. 187).

Pollution damage is defined in art. 1, para. 6 of the 1969 International Convention on Civil Liability for Oil Pollution Damage (United Nations, *Treaty Series*, vol. 973, p. 3); art. 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage (IMO document LEG/CONF.9/15. See also Birnie and Boyle, Basic Documents on International Law and the Environment (Oxford, 1995), 91-106); art. 1, para. 9 of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (IMO document LEG/CONF.12/DC/1); art. 1, para. 6 of the 1977 International Convention on Civil Liability for Oil Pollution Damage resulting from the Exploration for and Exploitation of Seabed Mineral Resources (*16 ILM* (1977) 1451).

For definition of nuclear damage, see art. I, para. 1k of the Vienna Convention on Civil Liability for Nuclear Damage (*2 ILM* (1963) 727); art. I, para. 1k of the 1997 Protocol to Amend the 1963 Vienna Convention (*36 ILM* (1997) 1462); art. 1 of the 1997 Convention on Supplementary Compensation for Nuclear Damage (*36 ILM* (1997) 1473); art. I, para. (a) (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the field of Nuclear Energy (www.nea.fr/html/law).

See also art. 1 (15) of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (*27 ILM* (1988) 859), which defines damage to the Antarctic environment or dependent or associated ecosystems; and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses which seeks in article 7 to "prevent the causing of significant harm" (General Assembly resolution 51/229 of 21 May 1997, for text see United Nations document A/51/869. See also *36 ILM* (1997) 700).

(ii) Loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) Loss or damage by impairment of the environment;

(iv) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) The costs of reasonable response measures;

(b) "Environment" includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

(c) "Transboundary damage" means damage caused in the territory or in other places under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft principle 1 are carried out;

(d) "Hazardous activity" means an activity which involves a risk of causing significant harm through its physical consequences;

(e) "Operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Commentary

(1) The definition of damage is crucial for the purposes of the present draft principles. The elements of damage are identified in part to set out the basis of claims for damage. Before identifying the elements of damage, it is important to note that damage to be eligible for compensation should acquire a certain threshold and that in turn would trigger the operation of the present draft principles. For example, the *Trail Smelter* award was concerned only with the "serious consequences" of the operation of the smelter at the Trail.[363] The *Lake Lanoux* award dealt with only serious injury.[364] A number of conventions have also referred to

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[363] *Trail Smelter* Arbitration; *U.N.R.I.A.A.*, vol. III, p. 1965.

[364] *Lake Lanoux Arbitration (France v. Spain)*, ibid., vol. XII, p. 281.

"significant", "serious" or "substantial" harm or damage as the threshold for giving rise to legal claims.[365] "Significant" has also been used in other legal instruments and domestic law.[366]

(2) The determination of "significant damage" involves both factual and objective criteria, and a value determination. The latter is dependent on the circumstances of a particular case and the period in which it is made. For instance, a certain deprivation at a particular time might not be considered "significant" because at that specific time scientific knowledge or human appreciation might have considered that deprivation as tolerable. But some time later that view might change and the same deprivation might then be considered "significant damage". The sensitivity of the international community to air and water pollution levels has been constantly undergoing change.

(3) Paragraph (a) defines "damage", as significant damage caused to persons, property or the environment. Subparagraphs (i) and (ii) cover personal injury and property damage and aspects

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[365] See, for example, art. 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities (*27 ILM* (1988), p. 868); arts. 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context (*30 ILM* (1991) 802); and art. 7 of the Convention on the Non-navigational Uses of International Watercourses.

[366] See, for example, art. 5 of the draft Convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965 (Organization of American States, Rios y Lagos Internacionales, 4th ed. 1971), p. 132; the Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, *International Law Association, Report of the Fifty-second Conference* (Helsinki, 1966), p. 496; art. 21 of the [Revised] International Law Association Rules on the Equitable Use and Sustainable Development of Waters (tenth draft February 2004), www.ila.hq.org/pdf/water; paras. 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; Recommendation of the Council of the Organization for Economic Cooperation and Development (OECD) on Principles concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents, p. 35, reprinted in *14 ILM* (1975), p. 246; the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and art. 7 of the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, in *22 ILM* (1983), p. 1025. The United States has also used the word "significant" in its domestic law dealing with environmental issues. See the *American Law Institute, Restatement of the Law*, Section 601, Reporter's Note 3, pp. 111-112.

of pure economic loss, as well as aspects of national cultural heritage, which may be State property. Damage does not occur in isolation or in a vacuum. It occurs to somebody or something.

(4) Thus, in subparagraph (i) damage to persons includes loss of life or personal injury. There are examples at domestic law[367] and in treaty practice.[368] Even those liability regimes that are only concerned with environmental injury, which do not directly address injury to persons recognize that other rules would apply.[369] Those regimes that are silent on the matter do not also seem to entirely exclude the possible submission of a claim under this heading of damage.[370]

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[367] The Environmental Liability Act of Germany for example covers anybody who suffers death or personal injury. The Environmental Damage Compensation Act of Finland, the Environmental Code of Sweden, the Compensation for Environmental Damage Act of Denmark all cover personal injury.

[368] Some liability regimes provide as follows: art. I, para. 1 (k) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage defines nuclear damage to include "(i) loss of life, any personal injury or any loss of, or damage to, property …"; art. I, para. 1 (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1997 Vienna Convention), also refers to "(i) loss of life or personal injury; (ii) loss of or damage to property; …"; art. I, para. (vii) of the 2004 Paris Convention defines nuclear damage to include "1. loss of life or personal injury; 2. loss of or damage to property; …"; the CTRD defines the concept of "damage" in para. 10 of art. 1 "(a) loss of life or personal injury ...; (b) loss of or damage to property ..."; the Basel Protocol defines "damage", in art. 2, para. 2 (c), as: "(i) Loss of life or personal injury; (ii) Loss of or damage to property other than property held by the person liable in accordance with the present protocol;"; the Kiev Protocol, defines damage in art. 2, para. 2 (d), as: "(i) Loss of life or personal injury; (ii) Loss of, or damage to, property other than property held by the person liable in accordance with the Protocol;"; the Lugano Convention defines damage in art. 2 (7) as: "a. Loss of life or personal injury; b. Loss or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity".

[369] Directive 2004/35/CE on environmental liability does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any rights regarding such types of damages.

[370] Pollution damage is defined in art. 1, para. 6 of the International Convention on Civil Liability for Oil Pollution Damage (United Nations *Treaty Series*, vol. 973, p. 3); art. 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage (IMO document LEG/CONF.9/15), art. 1, para. 9.

(5) In subparagraph (ii) damage to property, includes loss of or damage to property. Property includes movable and immovable property. There are examples at domestic law[371] and in treaty practice.[372] For policy considerations, some liability regimes exclude damage to the property of the person liable. A tortfeasor is not allowed to benefit from his or her own wrongs. Article 2 (2) (c) (ii) of the Basel Protocol, article 2 (7) (b) of the Lugano Convention and article 2 (2) (d) (ii) of the Kiev Protocol contain provisions to this effect.

(6) Traditionally, proprietary rights have been more concerned about the private rights of the individual rather than rights of the public. An individual would face no difficulty to pursue a claim concerning his personal or proprietary rights. These are claims concerning possessory or proprietary interests which involve loss of life or personal injury or loss of, or damage to property. Furthermore, tort law has also tended to cover damage that may relate to the environment. This is the case with property damage, personal injury or aspects of pure economic loss sustained as a consequence of damage to the environment. In this connection, a distinction is often made between consequential and pure economic losses.[373]

(7) Consequential economic losses are the result of a loss of life or personal injury or damage to property. These would include loss of earnings as a result of personal injury. For example, under section 2702 (b) of the United States Oil Pollution Act any person may recover damages for injury to, or economic losses resulting from the destruction of real or personal property which shall be recoverable by a claimant who owns or leases such property. The subsection also provides that any person may recover "damages equal to the *loss of profits or impairment of earning capacity* due to the injury, destruction, or loss of real property, personal property ..."

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[371] For example, the Environmental Damage Compensation Act of Finland covers damage to property. Chapter 32 of the Environmental Code of Sweden also provides for compensation for, damage to property; the Compensation for Environmental Damage Act of Denmark covers damage to property.

[372] See examples in footnote 368 above.

[373] Bjorn Sandvik and Satu Suikkari, "Harm and Reparation in International Treaty regimes: An Overview", in Peter Wetterstein, *Harm to the Environment* ..., op. cit., p. 57. See generally, Edward H.P. Brans, Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment (2001) Kluwer Law International, pp. 9-63. See also Julio Barboza, Special Rapporteur, Eleventh report, document A/CN.4/468 (1995).

Similarly, section 252 of the German Civil Code provides that any loss of profit is to be compensated. For the purposes of the present draft principles, this type of damage is to be covered under subparagraphs (i) and (ii).[374] There are therefore different approaches on compensation for loss of income. However, in the absence of a specific legal provision for claims covering loss of income it would be reasonable to expect that if an incident involving a hazardous activity directly causes serious loss of income for a victim the State concerned would act to ensure that the victim is not left to bear loss unsupported.

(8) On the other hand, pure economic loss is not linked to personal injury or damage to property. An oil spill off a seacoast may immediately lead to lost business for the tourism and fishing industry within the precincts of the incident. Such occurrences have led to claims for pure economic loss without much success. However, some domestic legislation and liability regimes now recognize this head of compensable damage. Subsection 2702 (b) of the United States Oil Pollution Act provides that any person may recover "damages equal to the *loss of profits or impairment of earning capacity* due to the injury, destruction, or loss of … natural resources". The Environmental Damage Compensation Act of Finland also covers pure economic loss, except where such losses are insignificant. Chapter 32 of the Environmental Code of Sweden also provides for pure economic loss. Pure economic loss not caused by criminal behaviour is compensable only to the extent that it is significant. The Compensation for

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[374] See, for example, art. I (1) (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, defines nuclear damage as including … each of the following to the extent determined by the law of the competent court (iii) economic loss arising from loss or damage referred to in subparagraph (i) or (ii), insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage; … (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court … . See also art. 1 of the 1997 Convention on Supplementary Compensation for Nuclear Damage, which covers and each of the following to the extent determined by the law of the competent court: (iii) economic loss arising from loss or damage referred to in subparagraph (i) or (ii), insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage; … (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court. Art. I (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the field of Nuclear Energy defines nuclear damage as including each of the following to the extent determined by the law of the competent court, … (3) economic loss arising from loss or damage referred to in subparagraph 1 or 2 above insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage.

Environmental Damage Act of Denmark covers economic loss and reasonable costs for preventive measures or for the restoration of the environment. On the other hand, the Environmental Liability Act of Germany does not cover pure economic loss.[375]

(9) Article 2 (d) (iii) of the Kiev Protocol and article 2 (2) (d) (iii) of the Basel Protocol cover loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs. For purposes of the present draft principles, this type of damage is covered under subparagraph (iii).[376]

(10) Subparagraph (ii) also covers property which forms part of cultural heritage. State property includes national cultural heritage. It embraces a wide range of items, including monuments, buildings and sites, while natural heritage denotes natural features and sites and geological and physiological formations. Their values lie in their historical, artistic, scientific, aesthetic, ethnological, or anthropological importance or in their conservation or natural beauty. The 1972 Convention concerning the Protection of World Cultural and Natural Heritage has a

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[375] See generally, Peter Wetterstein, "Environmental Damage in the Legal Systems of the Nordic Countries and Germany", in Michael Bowman and Alan Boyle, *Environmental Damage in International Law and Comparative Law: Problems of Definition and Evaluation* (Oxford University Press) 2002, pp. 222-242.

[376] See also art. I (1) (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, defines nuclear damage as including … each of the following to the extent determined by the law of the competent court (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii). See also art. 1 of the 1997 Convention on Supplementary Compensation for Nuclear Damage, which covers each of the following to the extent determined by the law of the competent court: … (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii); and art. I (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the field of Nuclear Energy defines nuclear damage as including each of the following to the extent determined by the law of the competent court, … (5) loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph 2 above; … .

comprehensive definition of cultural heritage.[377] Not all civil liability regimes include aspects concerning cultural heritage under this head. For example, the Lugano Convention includes in its definition of "environment", property which forms part of the cultural heritage.[378]

(11) Respecting and safeguarding cultural property are primary considerations in times of peace as well as in times of armed conflict. This principle is asserted in the Hague Convention for the Protection of Cultural Property in the event of armed conflict.[379] Moreover, international humanitarian law prohibits commission of hostilities directed against historical monuments and works of art which constitute the cultural heritage of peoples.[380]

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[377] *11 ILM* (1972) 1294. Article 1 defines "cultural heritage" for purposes of the Convention as:

> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

See also definition of cultural property in art. 1 of the 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict, which essentially covers movable and immovable property of great importance to the cultural heritage of peoples. See also the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. See also the Convention for the Safeguarding of the Intangible Cultural Heritage, MISC/2003/CLT/CH/14, of 17 October 2003.

[378] See also art. 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[379] Done at The Hague on 14 May 1954.

[380] The Additional Protocols to the Geneva Conventions, art. 53 of Protocol I and art. 16 of Protocol II. See also the Hague Conventions of 1907, particularly Convention IV and its Regulations concerning the Laws and Customs of War on Land (arts. 27 and 56 of the Regulations) and Convention IX, respecting Bombardment by Naval Forces in Time of

(12) Subparagraph (iii) is concerned with questions concerning damage to the environment per se. This is damage caused to the environment itself by the hazardous activity without relating the same in any way to the damage to persons or property. In the case of damage to the environment per se, it is not easy to establish standing. The environment does not belong to anyone. It is generally considered to be common property (*res communis omnium*) not open to private possession, as opposed to *res nullius*, that is, property not belonging to anyone but open to private possession. A person does not have an individual right to such common property and would not ordinarily have standing to pursue a claim in respect of damage to such property.[381] Moreover, it is not always easy to appreciate who may suffer loss of ecological or aesthetic values or be injured as a consequence for purposes of establishing a claim. States instead hold such property in trust, and usually public authorities and more recently, public interest groups, have been given standing to pursue claims.[382]

(13) Subparagraphs (iii) to (v) deal with claims that are usually associated with damage to environment. Paragraph (b) deals with the definition of environment. They may all be treated as parts of one whole concept. Together, they constitute the essential elements inclusive in a definition of damage to the environment. The concept of harm to the environment is reflected in several liability regimes.[383] Environment could be defined in different ways for different

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War (art. 5), as well as the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the event of armed conflict of 29 March 1999, www.unesco.org/culture/laws/hague.

[381] In *Burgess v. M/V Tamano*, 370 F.Supp (1973) 247 at 247, the court noted that "It is also uncontroverted that the right to finish or to harvest clams … is not the private right of any individual, but is a public right held by the State 'in trust for the common benefit of the people'…".

[382] Under the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A., sections 9601 et seq.; Clean Water Act of 1977, 33 U.S.C.A., section 1321; Oil Pollution Act of 1990, 33 U.S.C.A., sections 2701 et seq., the United States "Congress empowered government agencies with management jurisdiction over natural resources to act as trustees to assess and recover damages ... [t]he public trust is defined broadly to encompass 'natural resources'... belonging to, managed by, held in trust by, appertaining to or otherwise controlled by Federal, state or local governments or Indian tribes".

[383] See for example, of the Lugano Convention (art. 2, para. (7) (d)); the Convention on the Transboundary Effects of Industrial Accidents (art. 1 (c), *31 ILM* (1992) 818); the 1992 ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes

purposes and it is good to bear in mind that there is no universally accepted definition. It is however considered useful to offer a working definition for the purposes of the present draft principles. It helps to put into perspective the scope of the remedial action required in respect of environmental damage.[384]

(14) Paragraph (b) defines "environment". Environment could be defined in a restricted way, limiting it exclusively to natural resources, such as air, soil, water, fauna and flora, and their interaction. A broader definition could embrace environmental values also. The Commission has opted to include in the definition the latter encompassing non-service values such aesthetic aspects of the landscape also.[385] This includes the enjoyment of nature because of its natural beauty and its recreational attributes and opportunities associated with it. This broader approach is justified by the general and residual character of the present draft principles.[386]

(art. 1 (2), *31 ILM* (1992) 1312); the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) (art. 8 (2) (a), (b) and (d)); the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (art. 9 (c) and (d)); the Basel Protocol (art. 2 (2) (c) (iv) and (v)); and the Kiev Protocol (art. 2 (d) (iv)-(v)).

[384] See European Communities Green Paper on remedying environmental damage, COM (93) 47 final, 14 May 1993, p. 10. See also art. 2 of Directive 2004/35/CE on environmental liability.

[385] For a philosophical analysis underpinning a regime for damage to biodiversity, see Michael Bowman, "Biodiversity, Intrinsic Value and the Definition and Valuation of Environmental Harm in Michael Bowman and Alan Boyle, *Environmental Damage* ..., op. cit., pp. 41-61. Article 2 of the 1972 Convention concerning the Protection of World Cultural and Natural Heritage defines "natural heritage" as "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

[386] For a concise discussion of the differing approaches on the definition of environmental damage, see Philippe Sands, *Principles of Environmental Law*, Second edition (2003), pp. 876-878.

(15) Moreover, the Commission in taking such a holistic approach is, in the words of the International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project*:[387]

> mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[388]

(16) Furthermore, a broader definition would attenuate any limitation imposed under liability regimes on the remedial responses acceptable and is reflected in subparagraphs (iv) and (v).

(17) Thus, while the reference in paragraph (b) to "natural resources … and the interaction" of its factors embraces the familiar concept of environment within a protected ecosystem,[389] the reference to "the characteristic aspects of the landscape denotes an acknowledgement of a broader concept of environment.[390] The definition of natural resources includes living and non-living natural resources, including their ecosystems.

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[387] *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports*, 1997, p. 7.

[388] Ibid., paras. 141-142. The Court in this connection also alluded to the need to keep in view the inter-generational and intra-generational interests and the contemporary demand to promote the concept of sustainable development.

[389] Under art. 2 of the Convention on Biological Diversity, "ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit". Under the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA):

> "Damage to the Antarctic environment or dependent or associated ecosystems means any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention."

See also art. 3, para. 1, of the Protocol on Environmental Protection to the Antarctic Treaty, *30 ILM* (1991) 1461.

[390] Art. 2 (10) of the Lugano Convention contains a non-exhaustive list of components of the environment which includes: "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape"; art. 1 (c) of the Convention on the Transboundary Effects of Industrial Accidents refers to the adverse consequences of

(18) Subparagraph (iii) relates to the form that damage to the environment would take. This would include "loss or damage by impairment". Impairment includes injury to, modification, alteration, deterioration, destruction or loss. This entails diminution of quality, value or excellence in an injurious fashion. As noted in paragraph (9) above, claims concerning loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment may fall under this heading.

(19) It may be noted that the reference to "costs of reasonable measures of reinstatement" in subparagraph (iv), and reasonable costs of "clean-up" associated with the "costs of reasonable response measures" in subparagraph (v) are modern concepts. These elements of damage have gained recognition more recently because, as noted by one commentator, "there is a shift towards a greater focus on damage to the environment per se rather than primarily on damage to persons and to property".[391] Subparagraph (iv) makes it clear that reasonable costs of measures of reinstatement are reimbursable as part of claims of compensation in respect of transboundary damage. Recent treaty practice has tended to acknowledge the importance of such measures, but has left it to domestic law to indicate who may be entitled to take such measures. Such measures have been described as any reasonable measures aiming to assess, reinstate, or restore damaged or destroyed components of the environment or where this is not possible, to introduce, where appropriate, the equivalent of these components into environment.[392]

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industrial accidents on "(i) human beings, flora and fauna; (ii) soil, water, air and landscape; (iii) the interaction between the factors in (i) and (ii); material assets and cultural heritage, including historical monuments"; art. 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes says that "effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors". See also art. 2 of Directive 2004/35/CE on environmental liability.

[391] Louise de la Fayette, "The Concept of Environmental Damage in International Law", in Michael Bowman and Alan Boyle, *Environmental Damage* ..., op. cit, pp. 149-190, at pp. 166-167.

[392] See, for example, the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, art. I, para. 1 (k) (iv): "the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in subpara. (ii)"; the 1997 Convention on Supplementary Compensation for Nuclear Damage, art. 1 (v) "loss of income deriving from an

(20) The reference to "reasonable" is intended to indicate that the costs of such measures should not be excessively disproportionate to the usefulness resulting from the measure. In the *Commonwealth of Puerto Rico v. Zoe Colocotroni* the First Circuit of the United States Court of Appeals, stated:

> "[Recoverable costs are costs] reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive."[393]

(21) Subparagraph (v) includes costs of reasonable response measures as admissible claims of compensation in respect of transboundary damage. Recent treaty practice has tended to acknowledge the importance of such measures, but has left it to domestic law to indicate who may be entitled to take such measures.[394] Such measures include any reasonable measures taken

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economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subpara. (ii)"; the 2004 Paris Convention on Third Party Liability (art. I (vii) (4)): "the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in subparagraph 2". Art. 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage refers to impairment of the environment other than loss of profit from such impairment shall be limited to costs of reinstatement actually undertaken or to be undertaken. See also art. 2 (2) (c) (iv) and (d) of the Basel Protocol, art. 2 (7) (c) and (8) of the Lugano Convention and art. 2 (2) (d) (iv) and (g) of the Kiev Protocol.

[393] 628 F.2 d, p. 652 (1st Cir. 1980), cited in Colin de la Rue, "Environmental Damage Assessment" in Ralph P. Kroner (ed.) Transnational Environmental Liability and Insurance (1993), p. 71.

[394] See for example the 1997 Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, art. I, para. 1 (k) (vi): "the costs of preventive measures, and further loss or damage caused by such measures; the 1997 Convention on Supplementary Compensation for Nuclear Damage, art. 1 (vi): the costs of preventive measures, and further loss or damage caused by such measures"; the 2004 Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 1960, art. I (vii) (6): "the costs of preventive measures, and further

by any person including public authorities, following the occurrence of the transboundary damage, to prevent, minimize, or mitigate possible loss or damage or to arrange for environmental clean-up. The measures of response must be reasonable.

(22) Paragraph (c) defines "transboundary damage". It refers to damage occurring in one State because of an accident or incident involving a hazardous activity in another State. This concept is based on the well-accepted notions of territory, jurisdiction and control of a State. In that sense it refers to damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the hazardous activities are carried out. It does not matter whether or not the States concerned share a common border. This definition includes, for example, activities conducted under the jurisdiction or control of a State on its ships or platforms on the high seas, with effects on the territory of another State or in places under its jurisdiction or control.

(23) The definition is intended to clearly demarcate and distinguish a State under whose jurisdiction and control an activity covered by these draft principles is conducted, from a State, which has suffered the injurious impact. Different terms could be used for the purpose of the present principles. They include, as defined under the draft articles on prevention, the "State of origin" (the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out); and the "State likely to be affected" (a State on whose territory or in other places under whose jurisdiction or control there is the risk of significant transboundary harm and there may be more than one such State likely to be affected in relation to any given situation of transboundary damage). In addition, the "State of injury" (the State in the territory or otherwise in places under the jurisdiction or control of which transboundary damage occurs); and the "States concerned" (the State of origin, the State likely to

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loss or damage caused by such measures, in the case of subparas. 1 to 5 above, to the extent that the loss or damage arises out of or results from ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive". Art. 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage, refers to costs of preventive measures and further loss or damage caused by preventive measures. See also art. 2 (2) (c) (v) and (d) of the Basel Protocol; art. 2 (7) (d) and (9) of the Lugano Convention and art. 2 (2) (d) (v) and (h) of the Kiev Protocol.

be affected; and the State of injury) might also be used. These terms have not been employed in the present draft principles, but have been used at different places in the commentary as appropriate.

(24) As is often the case with incidents falling within the scope of the present draft principles, there may be victims both within the State of origin and within the other States of injury. In the disbursement of compensation, particularly in terms of the funds expected to be made available to victims as envisaged in principle 4 below, some funds may be made available for damage suffered in the State of origin. Article XI of the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage envisages such a system.[395]

(25) Paragraph (d) defines hazardous activity by reference to any activity, which has a risk of causing transboundary harm through physical consequences. The commentary to draft principle 1 above has explained the meaning and significance of the terms involved.

(26) Paragraph (e) defines "operator''. The definition of "operator" is a functional one. A person must be in command or in control of the activity.

(27) There is no general definition of operator under international law. The term however is employed in domestic law[396] and in treaty practice. In case of the latter, the nuclear damage regimes impose liability on the operator.[397] The definition of operator would however vary

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[395] *36 ILM* (1997) 1473.

[396] For domestic law, see, for example, the 1990 Oil Pollution Act (OPA) of the United States, in which the following individuals may be held liable: (a) responsible party such as the owner or operator of a vessel, onshore and offshore facility, deepwater port and pipeline; (b) the "guarantor", the "person other than the responsible party, who provides evidence of financial responsibility for a responsible party"; and (c) third parties (individuals other than those mentioned in the first two categories, their agents or employees or their independent contractors, whose conduct is the sole cause of injury). See also CERCLA (42 U.S.C.A. Section 9601 (2) (A)).

[397] See, for example, 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the 2004 Protocol to amend the Convention on Third Party Liability in the field of Nuclear Energy of 1960 (*operator of a nuclear installation*), (common art. 1, para. 2) and operator in respect to a nuclear installation refers to the person designated by the competent public authority as the operator of the installation (common art. 1 (vi)); the 1963 Vienna Convention on Civil Liability for Nuclear Damage (operator) (art. IV); the 1997 Protocol to

depending upon the nature of the activity. Channelling of liability on to one single entity, whether owner or operator is the hallmark of strict liability regimes. Thus, some person other than the operator may be specifically identified as liable depending on the interests involved in respect of a particular hazardous activity. For example at the 1969 Conference leading to the adoption of the 1969 International Convention on Civil Liability for Pollution Damage, the possibility existed to impose the liability on the ship owner or the cargo owner or both.[398] However under a compromise agreed, the ship owner was made strictly liable. The term "command" connotes an ability to use or control some instrumentality. Thus it may include the person making use of an aircraft at the time of the damage, or the owner of the aircraft if he retained the rights of navigation.[399]

(28) The term "control" denotes power or authority to manage, direct, regulate, administer or oversee.[400] This could include the person to whom decisive power over the technical functioning of an activity has been delegated, including the holder of a permit or authorization for such an

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Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage ("operator") (art. 1 (c)); the 1962 Convention on the Liability of Operators of Nuclear Ships (*operator of nuclear ships*) (art. II). See also the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels defines "carrier" with respect to inland navigation vessel as "the person who at the time of the incident controls the use of the vehicle on board which the dangerous goods are carried" (art. 1, para. 8); the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources defines operator of a continental shelf installation to include in the absence of a designation by a Contracting Party the person who is in overall control of the activities carried on at the installation (art. 1, para. 2); and under the EU Directive 2004/35/CE on environmental liability, which attaches liability on the *operator*, the term operator includes any natural or legal, private or public person who operates or controls the occupational activity.

[398] See LEG/CONF/C.2/SR.2-13, cited in David W. Abecassis and Richard L. Jarashow, *Oil Pollution from Ships*, 2nd ed. (1985) p. 253. Some regimes that attach liability to the ship owner are the 1992 International Convention on Civil Liability for Pollution Damage (art. III, para. 1); the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (art. III); the 1996 International Convention for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (art. 7, para. 1).

[399] 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, art. 12.

[400] The definition of ship owner in the Bunker Oil Convention is broad. It includes the registered owner, bareboat charterer, manager and operator of the ship (art. 1, para. 2).

activity or the person registering or notifying such an activity.[401] It may also include a parent company or other related entity, whether corporate or not, if that entity has actual control of the operation.[402] An operator may be a public or private entity. It is envisaged that a State could be an operator for purposes of the present definition.

(29) The phrase "at the time of the incident" is intended to establish a connection between the operator and the transboundary harm.

Principle 3

Objective

> The present draft principles aim at ensuring prompt and adequate compensation to natural or legal persons, including States, that are victims of transboundary damage, including damage to the environment.

Commentary

(1) The main objective of the present draft principles is to provide compensation in a manner that is predictable, equitable, expeditious and cost effective. The present draft principles also pursue other objectives. Among them are: (a) the provision of incentives to the operator and other relevant persons or entities to prevent transboundary damage from hazardous activities; (b) the promotion of cooperation among States to deal with issues concerning compensation in an amicable manner; and (c) the preservation and promotion of the viability of economic activities that are important to the welfare of States and peoples.

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[401] EU Directive on Environmental Liability, art. 1, para. 6.

[402] Under art. 8 of the CRAMRA, the primary liability lies with the *operator*, which is defined as a Party or an agency or instrumentality of a Party or a juridical person established under the law of a Party or a joint venture consisting exclusively of any combination of the aforementioned art. 1 (11). Pursuant to section 16.1 of the Standard clauses for exploration contract annexed to the Regulations on the Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority on 13 July 2000, the *contractor* is liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them ISBA/6/A/18, annex, Clause 16.

(2) The key objective of ensuring protection to victims suffering damage from transboundary harm through compensation has been an essential element from the inception of the topic by the Commission. In his schematic outline, Robert Q. Quentin-Baxter also focused on the need to protect victims, which required "measures of prevention that as far as possible avoid a risk of loss or injury and, insofar as that is not possible, measures of reparation" and that: "… an innocent victim should not be left to bear loss or injury; …".[403] The former consideration is already addressed by the draft articles on prevention.

(3) A formal definition of the term "victim" was not considered necessary but for purposes of the present draft principles the term includes natural and legal persons, including States as custodians of public property. This meaning is linked to and may be deduced from the definition of damage in draft principle 2, which includes damage to persons, property or the environment.[404] A group of persons or communes could also be victims. In the *Matter of the people of Enewetak* before the Marshall Islands Nuclear Claims Tribunal established under the 1987 Marshall Islands Nuclear Claims Tribunal Act, the Tribunal considered questions of compensation in respect of the people of Enewetak for past and future loss of use of the Enewetak atoll; for restoration of Enewetak to a safe and productive state; for the hardships suffered by the people of Enewetak as a result of their relocation attendant to their loss of use occasioned by the nuclear tests conducted on the atoll.[405] In the *Amoco Cadiz* litigation, following the Amoco Cadiz supertanker disaster off Brittany, French Administrative departments of Côtes du Nord and Finistère and numerous municipalities called "communes", and various

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[403] *Yearbook … 1982*, vol. II (Part One), p. 51, document A/CN.4/360*, para. 53, section 5 (paras. 2 and 3).

[404] In respect of the definition of victim under international criminal law, see for example the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985. See also the Rome Statute of the International Criminal Court, art. 79.

[405] *39 ILM* (2000) 1214. In December 1947, the people were removed from Enewetak atoll to Ujelang atoll. At the time of removal, the acreage of the atoll was 1,919.49 acres. On return on 1 October 1980, 43 tests of atomic devices had been conducted, at which time 815.33 acres were returned for use, another 949.8 acres were not available for use, and an additional 154.36 acres had been vaporized.

French individuals, businesses and associations sued the owner of the Amoco Cadiz, and its parent company in the United States. The claims involved lost business. The French Government itself laid claims for recovery of pollution damages and clean-up costs.[406]

(4) The meaning of victim is also linked to the question of standing. Some liability regimes such as the Lugano Convention and the EU Directive 2004/35/CE on environmental liability provide standing for non-governmental organizations.[407] The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters also gives standing to NGOs to act on behalf of public environmental interests.[408] Victims may also be those designated under national laws to act as public trustees to safeguard those resources and hence the legal standing to sue. The concept of public trust in many jurisdictions provides proper standing to different designated persons to lay claims for restoration and clean-up in case of any transboundary damage.[409] For example, under the United States Oil Pollution Act, such a right is given to the United States Government, a state, an Indian tribe, and a foreign government. Under the United States Comprehensive Environmental Response, Compensation and Liability Act (CERCLA 1980), as amended in 1986 by the Superfund Amendments and Reauthorization Act, locus standi has been given to only the federal government, authorized representatives of states, as trustees of natural resources, or by designated trustees of Indian tribes. In some other jurisdictions, public authorities have been given similar right of recourse. Norwegian law for example provides standing to private

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[406] Re Oil Spill by the Amoca Cadiz off the coast of France on 16 March 1978, MDL Docket No. 376 ND III. 1984, American Maritime Cases, 2123-2199. See Maria Clara Maffei, "The Compensation for Ecological Damage in the 'Patmos' case", in Francesco Francioni and Tullio Scovazzi, *International Responsibility for Environmental Harm* (1991), p. 381. See also, in the matter of the Oil Spill by the Amoco Cadiz off the coast of France on 16 March 1978, United States Court of Appeals for the Seventh Circuit. 954 F.2d 1279; 1992 U.S. App. LEXIS 833; 1992 AMC 913; 22 ELR 20835 12 June 1991.

[407] See art. 18 of the Lugano Convention and art. 12 of the EU Directive 2004/35/CE.

[408] For the text see *38 ILM* (1999) 517.

[409] Peter Wetterstein, "A Proprietary or Possessory Interest: …", op. cit., pp. 50-51.

organizations and societies to claim restoration costs. In France, some environmental associations have been given the right to claim compensation in criminal cases involving violation of certain environmental statutes.

(5) The notion of liability and compensation for victims is also reflected in Principle 22 of the Stockholm Declaration, wherein a common conviction is expressed that:

> "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[410]

(6) This is further addressed more broadly in Principle 13 of the Rio Declaration:

> "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

(7) The need for prompt and adequate compensation should also be perceived from the perspective of achieving "cost internalization", which constituted the core, in its origins, of the "polluter pays" principle.[411] It is a principle that argues for internalizing the true economic costs of pollution control, clean-up, and protection measures within the costs of the operation of the activity itself. It thus attempted to ensure that governments did not distort the costs of international trade and investment by subsidizing these environmental costs. The policy of OECD and the European Union endorses this. However, in implementation, the principle thus

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[410] *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14).

[411] M. Smets, "Le principe pollueur-payeur", *RGDIP*, 1993, pp. 339-364; N. de Sadeleer, Les principes du pollueur-payeur, de prévention et de précaution, Bruylant, Bruxelles, 1999, p. 157 ff.

endorsed, exhibits its own variations in different contexts. The "polluter pays" principle is referred to in a number of international instruments. It appears in very general terms as Principle 16 of the Rio Declaration:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[412]

(8) In treaty practice, the principle has provided a basis for constructing strict liability regimes. This is the case with the Lugano Convention which in the preamble notes "the desirability of providing for strict liability in this field taking into account the 'Polluter Pays' Principle". The 2003 Kiev Protocol refers, in its preamble, to the "Polluter Pays" principle as "a general principle of international environmental law, accepted also by the parties to" the 1992 Convention on Protection and Use of Transboundary Watercourses and International Lakes and the 1992 Convention on Transboundary Effects of Industrial Accidents.[413]

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[412] In its report on the Implementation of Agenda 21, the United Nations notes:

> "Progress has been made in incorporating the principles contained in the Rio Declaration … - including … the polluter pays principle … - in a variety of international and national legal instruments. While some progress has been made in implementing United Nations Conference on Environment and Development commitments through a variety of international legal instruments, much remains to be done to embody the Rio principles more firmly in law and practice."

Official Records of the General Assembly, Nineteenth Special Session, Supplement No. 2 (A/S-19/33), para. 14.

[413] It also finds reference, for example, in the 1990 International Convention on Oil Pollution Preparedness and Response (*30 ILM* (1990) 735); the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), (*32 ILM* (1993) 1069); the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (United Nations Law of the Sea Bulletin, vol. 22 (1993), p. 54); the 1992 Convention on the Protection of the Marine Environment of the Black Sea against Pollution (*32 ILM* (1993) 1110); the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the 1992 Convention on the Transboundary Effects of Industrial Accidents and the 1993 Lugano Convention, and the EU Directive 2004/35/CE on environmental liability.

(9) Some national judicial bodies have also given recognition to the principle. For example, the Indian Supreme Court in the *Vellore Citizens Welfare Forum v. Union of India*,[414] treating the principle as part of general international law, directed the Government of India to establish an authority to deal with the situation of environmental degradation due to the activities of the leather tannery industry in the state of Tamil Nadu. In that case, it was estimated that nearly 35,000 hectares of agricultural land in this tanneries belt became either partially or totally unfit for cultivation, and that the 170 types of chemicals used in the chrome tanning process had severely polluted the local drinking water. The Court fined each tannery Rs. 10,000 to be put into an Environmental Protection Fund. It also ordered the polluting tanneries to pay compensation and made the Collector/District Magistrates of the state of Tamil Nadu responsible to collect the compensation to be assessed and levied by the authority to be established as directed by the Court.[415]

(10) In the arbitration between France and the Netherlands, concerning the application of the Convention of 3 December 1976 on the Protection of the Rhine against Pollution and the Additional Protocol of 25 September 1991 against Pollution from Chlorides (France/Netherlands), the Arbitral Tribunal however took a different view when requested to consider the "polluter pays" principle in its interpretation of the Convention, although it was not

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[414] *All India Reports*, 1996, SC 2715.

[415] For a brief résumé of the Vellore Citizens Welfare Forum case, Donald Kaniaru, Lal Kurululasuriya and P.D. Abeyegunawardene (eds.), *Compendium of Summaries of Judicial Decisions in Environment Related Cases (with special reference to countries in South Asia)* (South Asia Co-operative Environment Program, Colombo, Sri Lanka, 1997). The Supreme Court of India in the subsequent case of *Andhra Pradesh Pollution Control Board v. Prof. M.V. Naidu (retired) and others* further elaborated on the obligations of prevention by emphasizing on the principle of precaution (replacing the principle of assimilative capacity contained in the Stockholm Declaration), the burden of proof placed on the respondent, and the principle of good governance, which includes the need to take necessary legislative, administrative and other actions (in this respect the Supreme Court relied on P.S. Rao First report on prevention, document A/CN.4/487/Add.1, paras. 103-104), *AIR 1999 SC 812*. See also *Andhra Pradesh Pollution Control Board II v. Prof. M.V. Naidu (retired)*, 2000 SOL No. 673 for a reiteration of these principles. See also www.SupremeCourtonline.Com/cases.

expressly referred to therein. The Tribunal concluded, in its award dated 12 March 2004, that, despite its importance in treaty law, the polluter pays principle is not a part of general international law. Therefore, it did not consider it pertinent to its interpretation of the Convention.[416]

(11) In addition, it has been noted that it "is doubtful that whether it (the 'polluter pays' principle) has achieved the status of generally applicable rule of customary international law, except perhaps in relation to States in the EC, the UNECE, and the OECD".[417]

(12) The principle also has its limitations. It has thus been noted:

> "The extent to which civil liability makes the polluter pay for environmental damage depends on a variety of factors. If liability is based on negligence, not only does this have to be proved, but harm which is neither reasonably foreseeable nor reasonably avoidable will not be compensated and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the 'polluter pays' principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers

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[416] Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 septembre 1991 Additionel à la Convention relative à la Protection du Rhin contre la pollution par les chlorures du 3 décembre 1976. The Tribunal stated, in the pertinent part in paras. 102-103:

> "102. … Le Tribunal note que les Pays-Bas, à l'appui de leur demande ont fait référence au principe du 'pollueur payeur'.
>
> 103. Le Tribunal observe que ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d'effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général."

Arbitral Award of 12 March 2004, available at http://www.pca-cpa.org.

[417] See, Philippe Sands, *Principles of International Environmental Law*, Second Edition (2003), for an illustration of the flexible way in which this principle is applied in the context of OECD and EU, pp. 281-285.

or nuclear installations. Moreover, a narrow definition of damage may exclude environmental losses which cannot be easily quantified in monetary terms, such as wildlife, or which affect the quality of the environment without causing actual physical damage."[418]

(13) It has also been asserted that the principle cannot be treated as a "rigid rule of universal application, nor are the means used to implement it going to be the same in all cases".[419] It is suggested that a "great deal of flexibility will be inevitable, taking full account of differences in the nature of the risk and the economic feasibility of full internalization of environmental costs in industries whose capacity to bear them will vary".[420]

(14) Draft principle 3 also emphasizes that damage to environment per se is actionable requiring prompt and adequate compensation. As noted in the commentary to draft principle 2, such compensation may not only include monetary compensation to the claimant but certainly allow reimbursement of reasonable measures of restoration and response.

(15) In general terms, there has been a reluctance to accept liability for damage to environment per se, unless such damage is linked to persons or property as a result of damage to environment.[421] The situation is changing incrementally.[422] In the case of damage to natural

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[418] Bernie and Boyle, *International Law*, op. cit., pp. 93-94.

[419] Ibid., pp. 94-95. See also United Nations Secretariat Survey of Liability regimes relevant to the topic of International Liability for Injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), A/CN.4/543, chap. II.

[420] Birnie and Boyle, *International Law* …, op. cit., p. 95. The authors noted that reference to "public interest" in Principle 16 of the Rio Declaration leaves "ample room", for exceptions and as adopted at Rio the principle "is neither absolute nor obligatory", p. 93. They also noted that in the case of the East European nuclear installations, the Western European Governments, who represent a large group of potential victims, have funded the work needed to improve the safety standards, p. 94.

[421] For contrasting results see *Blue Circle Industries Plc. v. Ministry of Defence* [1998], 3 All ER, and *Merlin v. British Nuclear Fuels, Plc.* [1990], 3 All ER 711.

[422] For difficulties involved in claims concerning ecological damage and prospects, see the *Patmos* and the *Haven* cases. See generally, Andrea Bianchi, "Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law", in Peter Wetterstein,

resources or environment, there is a right of compensation or reimbursement for costs incurred by way of reasonable preventive, restoration or reinstatement measures. This is further limited in the case of some conventions to measures *actually* undertaken, excluding loss of profit from the impairment of environment.[423]

"*Harm to the Environment* …", op. cit., p. 103 at 113-129. See also Maria Clara Maffei, "The Compensation for Ecological Damage in the 'Patmos' case", Francioni and Scovazzi, International Responsibility …", op. cit., p. 381 at 383-390; and David Ong, "The Relationship between Environmental Damage and Pollution: Marine Oil Pollution Laws in Malaysia and Singapore", in Bowman and Boyle, *Environmental Damage* …, op. cit., p. 191 at 201-204. See also Sands, "Principles …", op. cit., pp. 918-922. See also the 1979 *Antonio Gramsci* incident and the 1987 *Antonio Gramsci* incident, IOPC Fund Annual Report, 1980, p. 2; 1989, p. 31; 1990, pp. 28, et seq. See also generally, Wu Chao, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (1996) pp. 361-366: The IOPC Fund resolution No. 3 of 1980, did not allow the court to assess compensation to be paid by the Fund "*on the basis of an abstract quantification of damage calculated in accordance with theoretical models*". In the *Amoco Cadiz*, the Northern District Court of Illinois ordered Amoco Oil Corporation to pay $85.2 million in fines - $45 million for the costs of the spill and $39 million in interest. It denied compensation for non-economic damage. It thus dismissed claims concerning lost image and ecological damage. It noted: "It is true that the commune was unable for a time to provide clean beaches for the use of its citizens, and that it could not maintain the normal peace, quiet, and freedom from the dense traffic which would have been the normal condition of the commune absent the clean-up efforts", but concluded that the "loss of enjoyment claim by the communes is not a claim maintainable under French law". See citation in footnote 406. See also, Maria Clara Maffei, "The Compensation for Ecological Damage in the 'Patmos' case", Francioni and Scovazzi, International Responsibility …", op. cit., p. 381 at 393. Concerning lost image, the Court observed that the plaintiffs claim is compensable in measurable damage, to the extent that it can be demonstrated that this loss of image resulted in specific consequential harm to the commune by virtue of tourists and visitors who might otherwise have come staying away. Yet this is precisely the subject matter of the individual claims for damages by hotels, restaurants, camp grounds, and other businesses within the communes. As regards ecological damage, the Court dealt with problems of evaluating "the species killed in the intertidal zone by the oil spill" and observed that "this claimed damage is subject to the principle of res nullius and is not compensable for lack of standing of any person or entity to claim therefor", ibid. at 394. See also in the *Matter of the People of Enewetak 39 ILM* (2000), p. 1214 at 1219, before the Marshall Islands Nuclear Claims Tribunal, the Tribunal had an opportunity to consider whether restoration was an appropriate remedy for loss incurred by the people of the Enewetak atoll arising from nuclear tests conducted by the United States. It awarded clean-up and rehabilitation costs as follows: $22.5 million for soil removal; $15.5 million for potassium treatment; $31.5 million for soil disposal (causeway); $10 million for clean-up of plutonium; $4.51 million for surveys; and $17.7 million for soil rehabilitation and revegetation.

[423] See generally commentary to principle 2, paras. (8), (9), (18)-(21).

(16) The aim is not to restore or return the environment to its original state but to enable it to maintain its permanent functions. In the process it is not expected to incur expenditures disproportionate to the results desired and such costs should be cost effective. Subject to these considerations, if restoration or reinstatement of environment is not possible, it is reasonable to introduce the equivalent of those components into the environment.[424]

(17) The State or any other public agency, which steps in to undertake measures of restoration or response measures may recover the costs later for such operations from the operator. For example, such is the case under the US Comprehensive Environmental Response, Compensation and Liability Act, 1980 (CERCLA or Superfund). The Statute establishes the Superfund with tax dollars to be replenished by the costs recovered from liable parties, to pay for clean-ups if necessary. The United States Environmental Protection Agency operates the Superfund and has the broad powers to investigate contamination, select appropriate remedial actions, and either order liable parties to perform the clean-up or do the work itself and recover its costs.[425]

Principle 4

Prompt and adequate compensation

1. Each State should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability should be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

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[424] For analysis of the definition of environment and the compensable elements of damage to environment, see Barboza, Eleventh Report on International liability, document A/CN.4/468, pp. 1-17, at para. 28, p. 12. For an interesting account of the problem of damage, definition of harm, damage, adverse effects and damage valuation, see M.A. Fitzmaurice, International Protection of the Environment, *Recueil des Cours*, vol. 293 (2001), pp. 225-233.

[425] For an analysis of CERCLA, see Brighton and Askman, "The Role of the Government Trustees in Recovering Compensation for Injury to Natural Resources", in Peter Wetterstein (ed.), *Harm to the Environment* ..., op. cit., pp. 177-206, 183-184.

4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State should also ensure that additional financial resources are allocated.

Commentary

(1) This draft principle reflects the important role of the State of origin in setting up a workable system for compliance with the requirement of "prompt and adequate compensation". The reference to "Each State" in the present context is to the State of origin. The draft principle contains four interrelated elements: first, the State should establish a liability regime; second, any such liability regime should not require proof of fault; third, any conditions or limitations that may be placed on such liability should not erode the requirement of prompt and adequate compensation; and fourth, various forms of securities, insurance and industry funding should be created to provide sufficient financial guarantees for compensation. The five paragraphs of draft principle 4 express these four elements.

(2) Paragraph 1 addresses the first requirement. It requires that the State of origin take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities that take place within its territory or otherwise under its jurisdiction. The latter part of the paragraph reads "its territory or otherwise under its jurisdiction or control" and the terminology is the same as used in paragraph 1 (a) of article 6 of the draft articles on prevention. It is, of course, assumed that similar compensation would also be provided for damage within the State of origin from such incident.

(3) Paragraph 2 addresses the second and third requirements. It provides that such a liability regime should not require proof of fault and any conditions or limitations to such liability should be consistent with draft principle 3, which highlights the objective of "prompt and adequate compensation". The first sentence highlights the polluter-pay principle and provides that liability should be imposed on the operator or, where appropriate, other person or entity. The second sentence requires that such liability should not require proof of fault. The third sentence recognizes that it is customary for States and international conventions to subject liability to certain conditions or limitations. However, to ensure that such conditions and exceptions do not

fundamentally alter the nature of the requirement to provide for prompt and adequate compensation, the point has been emphasized that any such conditions or exceptions should be consistent with the requirement of prompt and adequate compensation in draft principle 3.

(4) Paragraph 3 provides that the measures provided by the State of origin should include the requirement that the operator or, where appropriate other person or entity, establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

(5) Paragraph 4 deals with industry funding at the national level. The words "these measures" reflect the point that the action a State is required to take would involve a collection of various measures.

(6) Paragraph 5 provides that in the event the measures mentioned in the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are allocated. As to the manner of ensuring financial security for prompt and adequate compensation the last three paragraphs leave the State of origin free. The draft principle also requires vigilance on the part of the State of origin to continuously review its domestic law to ensure that its regulations are kept up to date with the developments concerning technology and industry practices at home and elsewhere. Paragraph 5 does not require the State of origin to set up government funds to guarantee prompt and adequate compensation, but it provides that the State of origin should make sure that such additional financial resources are available.

(7) The emphasis in paragraph 1 is on all "necessary measures" and each State is given sufficient flexibility to achieve the objective, that is, of ensuring prompt and adequate compensation. The requirement is highlighted without prejudice to any ex gratia payments to be made or contingency and relief measures that States or other responsible entities may otherwise consider extending to the victims.

(8) In addition, for the purpose of the present draft principles, as noted above, it is assumed that the State of origin has performed fully all the obligations that are incumbent upon it under draft articles on prevention, particularly draft article 3. In the context of the present draft

principles, the responsibility of the State for wrongful acts is not contemplated. This is, however, without prejudice to claims that may be made under the law of State responsibility and other principles of international law.

(9) In this connection, paragraph 1 focuses on the requirement that the State should ensure payment of adequate and prompt compensation. The State itself is not obliged to pay compensation. The draft principle, in its present form, responds to and reflects a growing demand and consensus in the international community: as part of arrangements for permitting hazardous activities within its jurisdiction and control, it is widely expected that States would make sure that adequate mechanisms are also available to respond to claims for compensation in case of any damage.

(10) As noted in the commentary to draft principle 3, the need to develop liability regimes in an international context has been recognized and finds expression, for example, in Principle 22 of the Stockholm Declaration of 1972 and Principle 13 of the Rio Declaration of 1992.[426] While these principles are not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community.[427]

(11) The underlying assumptions of the present draft principle could also be traced back to the *Trail Smelter* Arbitration. Even though in that case Canada took upon itself the obligation to pay the necessary compensation on behalf of the private company, the basic principle established in that case entailed a duty of a State to ensure payment of prompt and adequate compensation for any transboundary damage.

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[426] See also the 2000 *Malmö* Declaration and the 2001 Montevideo Programme III approved and adopted by decision 21/23 of the 21st session of the UNEP Governing Council and the Plan of Implementation of the World Summit on Sustainable Development, *A/CONF.199/20, resolution 2 of 2 September 2002, annex.*

[427] Birnie and Boyle, *International Law* … op. cit., note at p. 105 that "[t]hese principles all reflect more recent developments in international law and State practice; their present status as principles of general international law is more questionable; but the evidence of consensus support provided by the Rio Declaration is an important indication of their emerging legal significance".

(12) Paragraph 2 spells out the first important measure that ought to be taken by each State, namely the imposition of liability on the operator or, where appropriate, other person or entity. The commentary to draft principle 1 has already elaborated on the meaning of operator. It is however worth stressing that liability in case of significant damage is channelled[428] to the operator of the installation. There are, however, other possibilities. In the case of ships, it is channelled to the owner, not the operator. This means that charterers - who may be the actual operators - are not liable under, for example, the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992. In other cases, liability is channelled through more than one entity. Under the Basel Protocol, waste generators, exporters, importers and disposers are all potentially liable at different stages in the transit of waste. The real underlying principle is not that "operators" are always liable, but that the party with the most effective control of the risk at the time of the accident or the most effective ability to provide compensation is made primarily liable.

(13) Channelling of liability to the operator or a single person or entity is seen as a reflection of the "polluter pays" principle. However, it has, as explained in the commentary to draft principle 3 above, its own limitations and needs to be employed with flexibility. In spite of its impact on the current trend of States to progressively internalize the costs of polluting industries, the principle has not yet been widely seen as part of general international law.

(14) Paragraph 2 also provides that liability should not be based on proof of fault. Hazardous and ultra-hazardous activities, the subject of the present principles, involve complex operations and carry with them certain inherent risks of causing significant harm. In such matters, it is widely recognized that proof of fault or negligence should not be required and that the person should be held liable even if all the necessary care expected of a prudent person has been discharged. Strict liability is recognized in many jurisdictions, when assigning liability for

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[428] According to Goldie, the nuclear liability conventions initiated the new trend of channelling liability back to operator "no matter how long the chain of causation, nor how novel the intervening factors (other than a very limited number of exculpatory ones)", see L.F.E. Goldie, "Concepts of Strict and Absolute Liability and the Ranking of Liability in terms of Relative Exposure to Risk", *XVI Netherlands Yearbook of International Law* 174-248 (1985), p. 196. On this point see also Goldie, "Liability for Damage and the Progressive Development of International Law", *14 ICLQ* (1965), p. 1189, pp. 1215-8.

inherently dangerous or hazardous activities.[429] In any case, the present proposition may be considered as a measure of progressive development of international law. Strict liability has been adopted as the basis of liability in several instruments; and among the recently negotiated instruments, it is provided for in article 4 of the Kiev Protocol, article 4 of the Basel Protocol; and article 8 of the Lugano Convention.

(15) There are several reasons for the adoption of strict liability. It relieves claimants of the burden of proof for risk-bearing activities involving relatively complex technical industrial processes and installations. It would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret.

(16) In addition, since profits associated with the risky activity provide a motivation for industry in undertaking such activity, strict liability regimes are generally assumed to provide incentives for better management of the risk involved. This is an assumption, which may not always hold up. As these activities have been accepted only because of their social utility and indispensability for economic growth, States may wish to consider at every opportune time, reviewing their indispensability by exploring more environmentally sound alternatives which are also at the same time less hazardous.

(17) Equally common in cases of strict liability is the concept of limited liability. Limited liability has several policy objectives. It is justified as a matter of convenience to encourage the operator to continue to be engaged in such a hazardous but socially and economically beneficial activity. Strict but limited liability is also aimed at securing reasonable insurance cover for the activity. Further, if liability has to be strict, that is if liability has to be established without a strict burden of proof for the claimants, limited liability may be regarded as a reasonable quid pro quo. Although none of the propositions are self-evident truths, they are widely regarded as relevant.[430]

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[429] See United Nations Secretariat, *Survey* …, op. cit., chap. I.

[430] See Robin R. Churchill, "Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects", *12 Yearbook International Environmental Law* (2001), pp. 3-41, at pp. 35-37.

(18) It is arguable that a scheme of limited liability is unsatisfactory, as it is not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits are set too low, it could even become a licence to pollute or cause injury to others and externalize the real costs of the operator. Secondly, it may not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury. For this reason, it is important to set limits of financial liability at a sufficiently high level, keeping in view the magnitude of the risk of the activity and the reasonable possibility for insurance to cover a significant portion of the risk involved.

(19) One advantage of a strict but limited liability from the perspective of the victim is that the person concerned need not prove negligence and would also know precisely whom to sue.

(20) In cases where harm is caused by more than one activity and could not reasonably be traced to any one of them or cannot be separated with a sufficient degree of certainty, jurisdictions have tended to make provision for joint and several liability.[431] Some existing international instruments also provide for that kind of liability.[432]

(21) Limits are well known in the case of regimes governing oil pollution at sea and nuclear incidents. For example, under the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992, the shipowner's maximum limit of liability is 59.7 million Special Drawing Rights; thereafter the International Oil Pollution Compensation Fund is liable to compensate for further damage up to a total of 135 million SDRs (including the

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[431] On joint and several liability, Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context*, 2001, Kluwer, 298-306.

[432] For examples of treaty practice, see for example art. IV of the 1969 International Convention on Civil Liability for Pollution Damage; art. IV of the 1992 International Convention on Civil Liability for Pollution Damage; art. 8 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; art. 5 of the International Convention on Civil Liability for Bunker Oil Pollution Damage; art. 4 of the Basel Protocol; art. 4 of the Kiev Protocol; art. 11 of the Lugano Convention. See also art. VII of the 1962 Convention on the Liability of Operators of Nuclear Ships; art. II of the 1997 Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage; art. II of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; art. 3 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy; art. 3 of the 2004 Protocol to amend the 1960 Convention on Third Party Liability in the field of Nuclear Energy.

amounts received from the owner), or in the case damage resulting from natural phenomena, a 200 million SDRs.[433] Similarly, the 1997 Vienna Convention on Civil Liability for Nuclear Damage also prescribed appropriate limits for the operator's liability.[434]

(22) Article 9 of the Kiev Protocol and article 12 of the Basel Protocol provide for strict but limited liability. In contrast, article 6 (1) and article 7 (1) of the Lugano Convention provide for strict liability without any provision for limiting the liability. Where limits are imposed on financial liability of operator, generally such limits do not affect any interest or costs awarded by the competent court. Moreover, limits of liability are subject to review on a regular basis.

(23) Most liability regimes exclude limited liability in case of fault. The operator is made liable for the damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions. Specific provisions to this extent are available in article 5 of the Basel Protocol and article 5 of the Kiev Protocol. In the case of operations involving highly complicated chemical or industrial processes or technology, fault liability could pose a serious burden of proof for the victims. The rights of victims could nevertheless be better safeguarded in several ways. For example, the burden of proof could be reversed requiring the operator to prove that no negligence or intentional wrongful conduct was involved. Liberal inferences may be drawn from the inherently dangerous activity. Statutory obligations could be imposed upon the operator to give access to the victims or the public to the information concerning the operations.

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[433] Art. V (1) of the 1992 Protocol and article 4 of the Fund Convention. Following the sinking of the Erika off the French coast in December 1999, the maximum limit was raised to 89.77 million SDRs, effective 1 November 2003. Under 2000 amendments to the 1992 Fund Protocol to enter into force in November 2003, the amounts have been raised from 135 million SDRs to 203 million SDRs. If three States contributing to the Fund receive more than 600 million tons of oil per annum, the maximum amount is raised to 300,740,000 SDRs, from 200 million SDRs. See also Sands, *Principles …*", op. cit., pp. 915, 917.

[434] For the text, *36 ILM* (1997) 1473. The installation State is required to assure that the operator is liable for any one incident for not less than 300 million SDRs or for a transition period of 10 years, a transitional amount of 150 million SDRs is to be assured, in addition by the installation State itself. The 1997 Convention on Supplementary Compensation provides an additional sum, which may exceed $1 billion. See Arts. III and IV. For the text, *33 ILM* (1994) 1518.

(24) Strict liability may alleviate the burden victims may otherwise have in proving fault of the operator but it does not eliminate the difficulties involved in establishing the necessary causal connection of the damage to the source of the activity. The principle of causation is linked to questions of foreseeability and proximity or direct loss. In those cases where fault liability is preferred, it may be noted that a negligence claim could be brought to recover compensation for injury if the plaintiff establishes that (a) the defendant owed a duty to the plaintiff to conform to a specified standard of care; (b) the defendant breached that duty; (c) the defendant's breach of duty proximately caused the injury to the plaintiff; and (d) the plaintiff suffered damage.

(25) Courts in different countries have applied the principle and notions of proximate cause, adequate causation, foreseeability, and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different countries have applied them with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict condicio sine qua non theory over the foreseeability ("adequacy") test to a less stringent causation test requiring only the "reasonable imputation" of damage. Further, the test foreseeability could become less and less important with the progress made in the fields of medicine, biology, biochemistry, statistics and other relevant fields. Given these reasons, it is suggested that it would seem difficult to include such tests in a more general analytical model on loss allocation.[435] All these matters, however, require to be addressed by each State in constructing its liability regime.

(26) Even if a causal link is established, there may be difficult questions regarding claims eligible for compensation, as for example, economic loss, pain and suffering, permanent disability, loss of amenities or of consortium, and the evaluation of the injury. Similarly, a property damage, which could be repaired or replaced, could be compensated on the basis of the value of the repair or replacement. But it is difficult to compensate damage caused to objects of historical or cultural value, except on the basis of arbitrary evaluation made on a case-by-case basis. Further, the looser and less concrete the link with the property which has been damaged, the less certain that the right to compensation exists. Question has also arisen whether a pure economic loss involving a loss of a right of an individual to enjoy a public facility, but not

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[435] See Peter Wetterstein, "A Proprietary or Possessory Interest …", pp. 29-53, at p. 40.

involving a direct personal loss or injury to a proprietary interest, qualify for compensation.[436] However, pure economic losses, such as the losses suffered by a hotel are payable, for example, in Sweden and in Finland but not in some other jurisdictions.[437]

(27) Paragraph 2 also addresses the question of conditions of exoneration. It is usual for liability regimes and domestic law providing for strict liability to specify a limited set of fairly uniform exceptions to the liability of the operator. A typical illustration of the exceptions to liability can be found in articles 8 and 9 of the Lugano Convention, article 3 of the Basel Convention or article 4 of the Kiev Protocol.[438] Liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil

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[436] Ibid., p. 32.

[437] Jan M. Van Dunne, "Liability for Pure Economic Loss: Rule or Exception? A Comparatist's View of the Civil Law - Common Law split on compensation of Non-Physical Damage in Tort Law", *Revue européenne de droit privé* 1999, pp. 397-428. See also *Weller and Company v. Foot and Mouth Disease Research Institute*, 1 QB, 1966, p. 569.

[438] Under paragraphs 2 and 3 of article III of the 1992 International Convention on Civil Liability for Oil Pollution Damage *war, hostilities, civil war, insurrection or natural phenomena of an exceptional, inevitable and irresistible character* are elements providing exoneration from liability for the owner, independently of negligence on the part of the claimant. See also article III of the 1969 International Convention on Civil Liability for Oil Pollution Damage; article 3 of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; article 7 of the 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea; article 3 of the 1977 Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources provides similar language in respect of the *operator of an installation*; article 3 of the 1989 Convention on Civil Liability for Damage caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

Exemptions are also referred to in art. IV (3) of the 1997 Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage: No liability under this Convention shall attach to an operator if he proves that the nuclear damage is directly due to an act of armed conflict, civil war, insurrection. See also article IV (3) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article 9 of 2004 Protocol to amend the 1960 Convention on Third Party Liability in the field of Nuclear Energy; article 3 (5) of the annex to the 1997 Convention on Supplementary Compensation for Nuclear Damage Convention; article 4 (1) the EU Directive 2004/35 on environmental liability. The Directive also does not apply to activities whose main purpose is to serve national defence or international security. In accordance with article 4 (6), it also does not apply to activities whose sole purpose is to protect from natural disasters. For examples at domestic law, see United Nations Secretariat *Survey*, op. cit., chap. III.

war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (c) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (d) wholly the result of the wrongful intentional conduct of a third party.

(28) If however, the person who has suffered damage has by his or her own fault caused the damage or contributed to it, compensation may be denied or reduced having regard to all the circumstances.

(29) If liability of the operator is excepted for any one of the above reasons, it does not however mean that the victim would be left alone to bear the loss. It is customary for States to make ex gratia payments, in addition to providing relief and rehabilitation assistance. Further, compensation would also be available from supplementary funding mechanisms. In the case of exemption of operator liability because of the exception concerning compliance with the public policy and regulations of the government, there is also the possibility to lay the claims of compensation against the State concerned.

(30) Paragraph 3 identifies another important measure that the State should take. It should oblige the operator (or where appropriate another person or entity) to have sufficient funds at its disposal not only to manage the hazardous activity safely and with all the care expected of a prudent person under the circumstances but also to be able to meet claims of compensation, in the event of an accident or incident. For this purpose, the operator may be required to possess necessary financial guarantees.

(31) The State concerned may establish minimum limits for financial securities for such purpose, taking into consideration the availability of capital resources through banks or other financial agencies. Even insurance schemes may require certain minimum financial solvency from the operator to extend their cover. Under most of the liability schemes, the operator is obliged to obtain insurance and such other suitable financial securities.[439] This may be

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[439] For treaty practice, see for example art. III of the 1962 Convention on the Liability of Operators of Nuclear Ships; art. VII of the 1997 Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage; art. VII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; art. 10 of the 1960 Convention on Third Party Liability in the Field of

particularly necessary to take advantage of the limited financial liability scheme, where it is available. However, in view of the diversity of legal systems and differences in economic conditions, States may be given some flexibility in requiring and arranging suitable financial and security guarantees.[440] An effective insurance system may also require wide participation by potentially interested States.[441]

(32) The importance of such mechanisms cannot be overemphasized. It has been noted that: "financial assurance is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market".[442] Insurance coverage may also be available for clean-up costs.

(33) The experience gained in insurance markets which are developed in the United States can be quickly transferred to other markets as the insurance industry is a growing global market. Article 14 of the EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, for example, provides that member States should take measures to encourage the development of security instruments and markets by the

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Nuclear Energy; art. 10 of the 2004 Protocol to amend the 1960 Convention on Third Party Liability in the field of Nuclear Energy. See also art. V of the 1992 International Convention on Civil Liability for Pollution Damage; art. 12 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; art. 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage; art. 14 of the Basel Protocol; article 11 of the Kiev Protocol; art. 12 of the Lugano Convention.

[440] See, for example, the statement by China, in *Official Records of the General Assembly, Fifty-eighth Session, Summary Records, Sixth Committee*, A/C.6/58/SR.19, para. 43.

[441] See, for example, the statement by Italy, ibid., A/C.6/58/SR.17, para. 28.

[442] See Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23 January 2002, COM (2002) 17 final, pp. 7-9.

appropriate security economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.

(34) One of the consequences of the availability of insurance and financial security is that a claim for compensation may be allowed as one option under domestic law, directly against any person providing financial security cover. However, such a person may be given the right to require the operator to be joined in the proceedings. Such a person is also entitled to invoke the defences that the operator would otherwise be entitled to invoke under the law. Article 11 (3) of the Kiev Protocol and article 14 (4) of the Basel Protocol provide for such possibilities. However, both Protocols allow States to make a declaration if they wish to not to allow for such direct action.

(35) Paragraphs 4 and 5 refer to the other equally important measures that the State should focus upon. This is about establishing supplementary funds at the national level. This, of course, does not preclude the assumption of these responsibilities at subordinate level of government in the case of a State with a federal system. All available schemes of allocation of loss envisage some sort of supplementary funding to meet claims of compensation in case the funds at the disposal of the operator are not adequate enough to provide compensation to victims. Most liability regimes concerning dangerous activities provide for additional funding sources to meet the claims of damage and particularly to meet the costs of response and restoration measures that are essential to contain the damage and to restore value to affected natural resources and public amenities.

(36) The additional sources of funding could be created out of different accounts. The first one could be out of public funds, as part of national budget. In other words, the State could take a share in the allocation of loss created by the damage. The second account is a common pool of fund created by contributions either from operators of the same category of dangerous activities or from entities for whose direct benefit the dangerous or hazardous activity is carried out. It is not often explicitly stated, which pool of funds - the one created by operators or by the beneficiaries or by the State - would, on a priority basis, provide the relief after exhausting the liability limits of the operator.

Principle 5

Response measures

With a view to minimizing any transboundary damage from an incident involving activities falling within the scope of the present draft principles, States, if necessary with the assistance of the operator, or, where appropriate, the operator, should take prompt and effective response measures. Such response measures should include prompt notification and, where appropriate, consultation and cooperation with all potentially affected States.

Commentary

(1) The importance of response action once an accident or incident has occurred triggering significant damage could not be over-stated. In fact, such measures are necessary to contain the damage from spreading, and should be taken immediately. This is done in most cases even without losing any time over identifying the responsible person or the cause or fault that triggered the event. Draft principle 5 assigns to the State in question the responsibility of determining how such measures should be taken and by whom - whether by the State itself, the operator or some other appropriate person or entity. While no operational sequence as such is contemplated in the phrase "States, if necessary with the assistance of the operator, or where appropriate, the operator," it is felt that it would be reasonable to assume that in most cases of transboundary damage the State would have a more prominent role. Such a role stems from the general obligation of States to ensure that activities within their jurisdiction and control do not give rise to transboundary harm. Moreover, the State would have the option of securing a reimbursement of costs of reasonable response measures. The drafting is also a recognition of the diplomatic nuances that are often present in such cases. On the other hand, the possibility of an operator, including a transnational corporation, being first to react, is not intended to be precluded.

(2) It is also common for the authorities of the State to respond immediately and evacuate affected people to places of safety and provide immediate emergency medical and other relief. It is for this reason that the principle recognizes the important role that the State enjoys in taking necessary measures as soon as the emergency arises, given its role in securing at all times the public welfare and protecting the public interest.

(3) The envisaged role of the State under the present principle is complementary to the role assigned to it under draft articles 16 and 17 of the draft articles on prevention, which deal with the requirements of "emergency preparedness", and "notification of emergency".[443]

(4) The present draft principle however should be distinguished and goes beyond those provisions. It deals with the need to take necessary response action after the occurrence of an incident resulting in damage, but if possible before it acquires the character of a transboundary damage. The State from which the harm originates is expected in its own interest and even as a matter of duty borne out of "elementary considerations of humanity"[444] to consult the States likely to be affected to determine the best possible response action to prevent or mitigate transboundary damage.[445] Various levels of interaction may be contemplated in the second sentence of the present draft principle, namely notification, consultation and cooperation. It is considered that the word "prompt" is more appropriate for "notification", but may not be entirely suitable in an emergency situation in reference to "consultation" and "cooperation", which are more consensual, guided by good faith, and usually triggered upon request. It is viewed that "where appropriate" would adequately cover these requirements and is sufficiently flexible to include a wide range of processes of interaction depending on the circumstances of each case.

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[443] For the text and commentaries of arts. 16 and 17 of the draft articles on prevention, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/56/10), 370-436, at 429-433. For the view that the treaty obligations to maintain contingency plans and respond to pollution emergencies must be seen as part of State's duty of due diligence in controlling sources of known environmental harm, Birnie and Boyle, *International Law* … op. cit. p. 137. The authors also note at p. 136 that "it is legitimate to view the *Corfu Channel* case as authority for customary obligation to give warning of known environmental hazards".

[444] See Corfu Channel, *I.C.J. Reports*, 1949, p. 4, at p. 22. For reference to the particular concept as part of "obligations … based … on certain general and well-recognized principles", as distinguished from the traditional sources of international law enumerated in art. 38 of the Statute of the International Court of Justice, Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des Cours*, vol. 250 (1994-VI), 291-292.

[445] On the duty of States to notify and consult with each other with a view to take appropriate actions to mitigate damage, see Principle 18 of the Rio Declaration; the 1992 Transboundary Effects of Industrial Accidents Convention; the 1992 Convention on Biological Diversity; and the 2000 Cartagena Protocol on Biosafety and the treaties in the field of nuclear accidents and the IAEA 1986 Convention on Early Notification of a Nuclear Accident. See also Sands, *Principles* … op. cit. pp. 841-847.

(5) Conversely, States likely to be affected are expected to extend to the State of origin their full cooperation. It is understood that the importance of taking response measures applies also to States that have been, or may be, affected by the transboundary damage. These States should take such response measures as are within their power in areas under their jurisdiction to help prevent or mitigate such transboundary damage. Such a response action is essential not only in the public interest but also to enable the appropriate authorities and courts to treat the subsequent claims for compensation and reimbursement of costs incurred for response measures taken as reasonable.[446]

(6) Any measure that State takes in responding to the emergency created by the hazardous activity does not and should not however put the role of the operator in any secondary or residuary role. The operator has an equal responsibility to maintain emergency preparedness and put into operation any such measures as soon as an incident occurred. The operator could and should give the State all the assistance it needs to discharge its responsibilities. Particularly, the operator is in the best position to indicate the details of the accident, its nature, the time of its occurrence and its exact location and the possible measures that parties likely to be affected could take to minimize the consequences of the damage.[447] In case the operator is unable to take the necessary response action, the State of origin should make necessary arrangements to take such action.[448] In this process it can seek necessary and available help from other States or competent international organizations.

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[446] In general, on the criterion of reasonableness in computing costs admissible for recovery, see Peter Wetterstein, "A Proprietory or Possessory Interest ..." op. cit. pp. 47-50.

[447] States are required to notify such details in case of nuclear incidents. See art. 2 of the IAEA Convention on Early Notification of a Nuclear Accident. They must also give the States likely to be affected through the IAEA other necessary information to minimize the radiological consequences. See also Sands, *Principles* ... op. cit. pp. 845-846.

[448] Under arts. 5 and 6 of the EU Directive 2004/35/CE on environmental liability, competent authorities, to be designated under art. 13, may require the operator to take necessary preventive or restoration measures or take such measures themselves, if the operator does not take them or cannot be found.

Principle 6

International and domestic remedies

1. States should provide appropriate procedures to ensure that compensation is provided in furtherance of draft principle 4 to victims of transboundary damage from hazardous activities.

2. Such procedures may include recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

3. To the extent necessary for the purpose of providing compensation in furtherance of draft principle 4, each State should ensure that its domestic administrative and judicial mechanisms possess the necessary competence and provide effective remedies to such victims. These mechanisms should not be less prompt, adequate and effective than those available to its nationals and should include appropriate access to information necessary to pursue such mechanisms.

Commentary

(1) Draft principle 6 indicates measures necessary to operationalize and implement the objective set forth in draft principle 4. Paragraph 1, which sets forth the requirement to ensure appropriate procedures for ensuring compensation applies to all States. This paragraph should be contrasted with paragraph 3, which particularizes the requirements contained therein to the State of origin.

(2) Paragraph 2 is intended to bring more specificity to the nature of the procedures involved. It refers to "international claims settlement procedures". Several procedures could be envisaged. For example, States could in the case of transboundary damage negotiate and agree on the quantum of compensation payable.[449] These may include mixed claims commissions,

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[449] In the case of damage caused to the fishermen, nationals of Japan due to nuclear tests conducted by the United States of America in 1954 near the Marshall Islands, the latter paid to Japan US$ 2 million, Whiteman, *Digest of International Law*, vol. 4, p. 565. See also E. Margolis, "The Hydrogen Bomb Experiments and International Law", *64 Yale Law Journal* (1955), 629 at 638-639. The USSR paid C$ 3 million by way of compensation by the USSR to Canada following the crash of Cosmos 954 in January 1978, Sands, *Principles* … op. cit. p. 887. See also *18 ILM* (1979) 907. The author also noted that though several European States paid compensation to their nationals for damage suffered due to the Chernobyl nuclear accident, they did not attempt to make formal claims for compensation, even while they reserved their right to do so, ibid., pp. 886-889. Mention may also be made of the draft articles 21 and 22 adopted by the working group of the Commission in 1996. Article 21 recommended that the State of origin and the affected States should negotiate at the request of either party on the nature and extent of

negotiations for lump sum payments, etc. The international component does not preclude possibilities whereby a State of origin may make a contribution to the State affected to disburse compensation through a national claims procedure established by the affected State. Such negotiations need not, unless otherwise desired, bar negotiations between the State of origin and the private injured parties and such parties and the person responsible for the activity causing significant damage. A lump sum compensation could be agreed either as a result of a trial or an out-of-court settlement.[450] Victims could be immediately given reasonable compensation on a provisional basis, pending a decision on the admissibility of claim and the actual extent of payable compensation. National claims commissions or joint claims commissions established for this purpose could examine the claims and settle the final payments of compensation.[451]

(3) The United Nations Compensation Commission[452] may offer itself as a useful model for some of the procedures envisaged under paragraph 2. In this case, the victims are authorized to

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compensation and other relief. Article 22 referred to several factors that States may wish to consider for arriving at the most equitable quantum of compensation. For the report of the Working Group of the Commission, 1996, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 320-327.

[450] In connection with the Bhopal Gas Leak disaster, the Government of India attempted to consolidate the claims of the victims. It sought to seek compensation by approaching the United States courts first but on grounds of forum non-conveniens the matter was litigated before the Supreme Court of India. The Bhopal Gas Leak disaster (Processing of Claims) Act, 1985 provides the basis for the consolidation of claims. The Supreme Court of India in the *Union Carbide Corporation v. Union of India and others, All India Reports* 1990 SC 273 gave an order settling the quantum of compensation to be paid in lump sum. It provided for the Union Carbide to pay a lump sum of $470 million to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal gas disaster. The original claim of the Indian Government was over $1 billion.

[451] For the April 2002 award of $324,949,311 to people of Enewatak in respect of damages to the land arising out of nuclear programmes carried out by the United States between 1946-1958, see *39 ILM* (2000) 1214.

[452] Established pursuant to Security Council resolution 687 (1991). See also Security Council resolutions 674 (1990), 692 (1991) and the Report of the Secretary-General pursuant to para. 19 of Security Council resolution 687 (1991), document S/22559. On the procedure adopted by the United Nations Compensation Commission, see Mojtaba Kazazi, "Environmental Damage in the Practice of the UN Compensation Commission", in Michael Bowman and Alan Boyle, *Environmental Damage* ... op. cit., pp. 111-13.

have recourse to the international procedure set up without being obliged to exhaust domestic remedies. This is of a nature as to enable settlement of claims within a short time frame.

(4) The Commission is aware of the heavy costs and expenses involved in pursuing claims on the international plane. It is also aware that some international claims take a long time to be resolved. The reference to procedures that are expeditious and involving minimal expenses is intended to reflect the desire not to overburden the victim with a lengthy procedure akin to a judicial proceedings which may act as a disincentive.

(5) Paragraph 3 focuses on domestic procedures. The obligation has been particularized to address the State of origin. It is an equal right of access provision. It is based on the presumption that right of access can only be exercised if there is an appropriate system in place for the exercise of the right. The first sentence of paragraph 3 therefore deals with the need to confer the necessary competence upon both the administrative and the judicial mechanisms. Such mechanisms should be able to entertain claims concerning activities falling within the scope of the present principles. The first sentence emphasizes the importance of ensuring effective remedies. It stresses the importance of removing hurdles in order to ensure participation in administrative hearings and proceedings. The second sentence deals with two aspects of the equal right of access. It emphasizes the importance of procedural non-discriminatory standards for determination of claims concerning hazardous activities. And, secondly, it deals with equal access to information. The reference to "appropriate" access is intended to indicate that in certain circumstances access to information or disclosure of information may be denied. It is, however, important that even in such circumstances information is readily available concerning the applicable exceptions, the grounds for refusal, procedures for review, and the charges applicable, if any. Where feasible, such information should be accessible free of charge or with minimal costs.

(6) The access to national procedures to be made available in the case of transboundary damage should be similar to those that a State provides under national law to its own nationals. It may be recalled that article 16 of the draft articles on prevention provides for a similar obligation for States in respect of the claims which may arise during the phase of prevention, a phase in which States are obliged to manage the risk involved in the hazardous activities with all

due diligence. A similar provision covering claims of compensation in respect of injury actually suffered, despite all best efforts to prevent damage, can be found in article 32 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

(7) The right of recourse is a principle based on non-discrimination and equal access to national remedies. For all its disadvantages, in providing access to information, and in ensuring appropriate cooperation between the relevant courts and national authorities across national boundaries, the principle does go beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants. This principle is also reflected in Principle 10 of the Rio Declaration, and in Principle 23 of the World Charter for Nature. It is also increasingly recognized in national constitutional law regarding protection of the environment.[453]

(8) Paragraph 3 does not alleviate or resolve problems concerning choice of law which is, given the diversity and lack of any consensus among States, a significant obstacle to deliver prompt, adequate and effective judicial recourse and remedies to victims,[454] particularly if they are poor and not assisted by expert counsel in the field. In spite of these disadvantages, it is still a step in the right direction and may even be regarded as essential. States could move the matters forward by promoting harmonization of laws and by agreement to extend such access and remedies.

(9) Under the 1968 Brussels Convention on Civil Jurisdiction and Enforcement of Judgments remedies may be made available in the courts of a party only where: (a) the damage was suffered; (b) the operator has his or her habitual residence; or (c) the operator has his or her principal place of business. Article 19 of the 1993 Lugano Convention, article 17 of the Basel Protocol, and article 13 of the Kiev Protocol provide for similar choice of forums.

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[453] K.W. Cuperus and Alan E. Boyle, "Articles on Private Law Remedies for Transboundary Damage in International Watercourses", in Report of the Sixty-seventh Conference, Helsinki, Finland (1996), p. 407.

[454] Ibid., pp. 403-411, p. 406.

Principle 7

Development of specific international regimes

1. States should cooperate in the development of appropriate international agreements on a global, regional or bilateral basis in order to make arrangements regarding the prevention and response measures to be followed in respect of particular categories of hazardous activities as well as the compensation and financial security measures to be taken.

2. Such agreements may include industry and/or State funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the losses suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry based funds.

Commentary

(1) Draft principle 7 corresponds to the set of provisions contained in draft principle 4, except that they are intended to operate at international level. Paragraph 1 encourages States to cooperate in the development of international agreements on a global, regional or bilateral basis in three areas: to make arrangements for prevention; to make arrangements for response measures in case of an accident with regard to specific categories of hazardous activities in order to minimize transboundary damage; and finally to make arrangements for compensation and financial security measures to secure prompt and adequate compensation.

(2) Paragraph 2 encourages States to cooperate in setting up, at the international level, various financial security systems whether through industry funds or State funds in order to make sure that victims of transboundary damage are provided with sufficient, prompt and adequate remedy. Paragraph 2 is also a recognition that regardless of what States may have to do domestically to comply with response measures and compensation, a more secure and consistent pattern of practice in this area requires international arrangements as well. This principle points to the need for States to enter into specific arrangements and tailor them to the particular circumstances of individual hazardous activities. It also recognizes that there are several variables in the regime concerning liability for transboundary regime that are best left to the discretion of individual States or their national laws or practice to select or choose, given their own particular needs, political realities and stages of economic development.

Arrangements concluded on a regional basis with respect to specific category of hazardous activities are likely to be more fruitful and durable in protecting the interest of their citizens, the environment and natural resources on which they are dependent.

(3) It may also be recalled that from the very inception of the topic, the Commission proceeded on the assumption that its primary aim was "to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects".[455] According to this view the term liability entailed "a negative asset, an obligation, in contradistinction to a right",[456] and accordingly it referred not only to the consequences of the infringement of an obligation but rather to the obligation itself. This topic thus viewed was to address primary responsibilities of States, while taking into consideration the existence and reconciliation of "legitimate interests and multiple factors".[457] Such effort was further understood to include a duty to develop not only principles of prevention as part of a duty of due and reasonable care but also providing for an adequate and agreed framework for compensation as a reflection of the application of equitable principles. This is the philosophy that permeated the whole scheme and it is most appropriately designated as a scheme of "shared expectations"[458] with "boundless choices" for States.[459]

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[455] *Yearbook ... 1980*, vol. II (Part One) p. 247, Preliminary Report, document A/CN.4/334, p. 250, para. 9.

[456] Ibid., para. 12.

[457] Ibid., para. 38.

[458] The "shared expectations" are those that "(a) have been expressed in correspondence or other exchanges between the States concerned or, insofar as there are no such expressions, (b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community", *Yearbook ... 1982*, vol. II (Part One), p. 51, at 63 document A/CN.4/360. Schematic Outline, Section 4, para. 4. On the nature of the "shared expectations", Barboza explained that "they have a certain capacity to establish rights". "This falls within the purview of the principle of good faith, of estoppel, or what is known in some legal systems as the doctrine of 'one's own acts'." See Second Report on the topic of international liability, *Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402, para. 22.

[459] *Yearbook ... 1980*, vol. II, Preliminary Report (Part One), para. 48.

Principle 8

Implementation

1. Each State should adopt any legislative, regulatory and administrative measures that may be necessary to implement the present draft principles.

2. The present draft principles and any implementing provisions should be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles consistent with their obligations under international law.

Commentary

(1) Draft principle 8 restates what is implied in the other draft principles, namely that each State should adopt legislative, regulatory and administrative measures for the implementation of these draft principles. It intends to highlight the significance of national implementation through domestic legislation of international standards or obligations agreed to by States parties to international arrangements and agreements. Paragraph 2 emphasizes that these draft principles and any implementing provisions should be applied without any discrimination on any grounds. The emphasis on "any" is to note that discrimination on any ground is not valid. The references to nationality, domicile or residence are retained to illustrate some relevant examples, which are common and relevant as the basis of such discrimination, in the context of settlement of claims concerning transboundary damage.

(2) Paragraph 3 is a general clause, which provides that States should cooperate with each other to implement the present draft principles consistent with their obligations under international law. This provision is drawn on the basis of article 8 of the Kiev Protocol. The importance of implementation mechanisms cannot be overemphasized. From the perspective of general and conventional international law, it operates at the international plane essentially as between States and that it requires to be implemented at the national level through specific domestic constitutional and other legislative techniques. Article 26 of the Vienna Convention on the Law of Treaties states the fundamental principle *pacta sunt servanda*.

Article 27 of the same Convention makes the well-known point that States cannot invoke their domestic law or the lack of it as a justification for its failure to perform the treaty obligations.[460] It is important that States enact suitable domestic legislation to implement these principles, lest victims of transboundary damage be left without adequate recourse.

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[460] Anthony Aust, Modern Treaty Law and Practice (Cambridge, 2000), chap. 10, 143-161, at 141. On the implementation of international decisions at the national level, there is considerable literature, dealing with the experience of different countries. See United Nations, *International Law: Collection of Essays* (New York, 1999), chap. III, 165-221.

CHAPTER VIII

UNILATERAL ACTS OF STATES

A. Introduction

177. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[461]

178. The General Assembly, in paragraph 13 of resolution 51/160, inter alia, invited the Commission to further examine the topic "Unilateral Acts of States" and to indicate its scope and content.

179. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[462]

180. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño, Special Rapporteur on the topic.[463]

181. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its work programme.

182. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[464] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

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[461] Ibid., *Fifty-first Session, Supplement No. 10* (A/51/10) p. 230 and pp. 328-329.

[462] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 196-210 and 194.

[463] Ibid., paras. 212 and 234.

[464] A/CN.4/486.

183. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[465]

184. At its fifty-first session, in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[466] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

185. The Working Group reported to the Commission on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

186. At its fifty-second session, in 2000, the Commission considered the third report of the Special Rapporteur on the topic,[467] along with the text of the replies received from States[468] to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

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[465] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 192-201.

[466] A/CN.4/500 and Add.1.

[467] A/CN.4/505.

[468] A/CN.4/500 and Add.1.

187. At its fifty-third session, in 2001, the Commission considered the fourth report of the Special Rapporteur[469] and established an open-ended Working Group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

188. At its fifty-fourth session, in 2002, the Commission considered the fifth report of the Special Rapporteur,[470] as well as the text of the replies received from States to the questionnaire on the topic circulated on 31 August 2001.[471] The Commission also established an open-ended Working Group.

189. At its fifty-fifth session in 2003, the Commission considered the sixth report of the Special Rapporteur.[472]

190. At its 2771st meeting, the Commission established an open-ended Working Group on Unilateral Acts of States chaired by Mr. Alain Pellet. The Working Group held six meetings.

191. At its 2783rd meeting, held on 31 July 2003, the Commission considered and adopted the recommendations contained in Parts 1 and 2 of the Working Group on the scope of the topic and the method of work.[473]

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[469] A/CN.4/519.

[470] A/CN.4/525 and Add.1, Corr.1, Corr.2 (Arabic and English only) and Add.2.

[471] A/CN.4/524.

[472] A/CN.4/534.

[473] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 304-308.

B. Consideration of the topic at the present session

192. At the present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/542 and Corr.1 (French only), Corr.2 and Corr.3), which it considered at its 2811th to 2813th and 2815th to 2818th meetings, held on 5 to 7 and 9, 13, 14 and 16 July 2004.

1. Introduction by the Special Rapporteur of his seventh report

193. The Special Rapporteur indicated that, in accordance with the recommendations made by the Commission in 2003 (particularly recommendation No. 4), the seventh report related to the practice of States in respect of unilateral acts and took account of the need to identify the relevant rules for codification and progressive development. He was especially grateful to the faculty and students of the University of Malaga for their valuable work on the report, which was based on material from various regions and legal systems and on statements by representatives of Governments and international organizations and decisions of international courts. The comments of Governments in the Sixth Committee had also been taken into account. However, few Governments had replied to the questionnaire that had been addressed to them.

194. The report, which dealt with acts and declarations producing legal effects, was only an initial study that could be given more detailed consideration in future if the Commission deemed that necessary.

195. In order to determine the criteria for the classification of acts and declarations, the Special Rapporteur used three generally established categories: acts by which a State assumes obligations (promise and recognition); acts by which a State waives a right (waiver); and acts by which a State reaffirms a right or a claim (protest). Although notification is formally a unilateral act, it produces effects that vary depending on the situation to which it referred (protest, promise, recognition, etc.), including in the context of treaty regimes.

196. Conduct that could have legal effects similar to unilateral acts formed the subject of a separate section, which consisted of a brief analysis of silence, consent and estoppel and their relationship with unilateral acts and described the practice of some international courts.

197. Promise and recognition are among the acts under which States assume obligations. They take the form of unilateral declarations by a single State or collectively by a number of States, whereby obligations are assumed and rights accorded to other States, international organizations or other entities. Several examples of such declarations - including some controversial ones, such as the Egyptian declaration of 26 July 1956 concerning the Suez Canal - were cited, on the basis of which it was established that a promise constitutes a unilateral expression of will made in public by a State having a specific intention and purpose. Such declarations could cover a vast array of topics, ranging from defence or financial questions to the commitment not to apply internal rules that might have an adverse effect on third States. Promises that do not create legal obligations, such as promises to assist with negotiations being conducted between two States, were excluded from the study.

198. Some promises elicit a reaction on the part of States that consider themselves affected. Such a reaction may take the form of protest or recognition of a specific situation. Others are subject to specific conditions, and this raises the question whether they constitute unilateral acts stricto sensu.

199. Certain declarations that may be of interest to the Commission have been made in the context of disarmament negotiations. Some of these declarations have been made by persons authorized to represent the State at the international level (ministers for foreign affairs, ambassadors, heads of delegation, etc.) and the scope of their effects raises difficult questions. Are they political declarations or declarations having the intention of creating legal obligations? The context in which such declarations were made could be one way of clarifying their scope and their consequences.

200. For methodological reasons, recognition was included, in the category of acts whereby States assume obligations. Although an exhaustive study was not carried out, the report stated that recognition was often based on a pre-existing situation; it did not create that situation. Most writers nevertheless considered recognition to be a manifestation of the will of a subject of international law, whereby that subject took note of a certain situation and expressed its intention to consider the situation legal. Recognition, which may be expressed by means of an explicit or implicit, oral or written declaration (or even by acts not constituting unilateral acts stricto sensu),

affects the rights, obligations and political interests of the "recognizing" State. Moreover, it does not have a retroactive effect, as the jurisprudence shows (case of *Eugène L. Didier, adm. et al. v. Chile*).[474]

201. The report dealt with various cases of recognition of States, given the wealth of practice relating, above all, to the "new" States of Eastern Europe, such as the States of the former Yugoslavia. Reference was made to conditional recognition and to cases of recognition arising out of membership of an international organization.

202. Cases of recognition of Governments, on the other hand, are less frequent and less well defined. The continuation or non-continuation of diplomatic relations and the withdrawal of ambassadors are factors in the practice of recognition.

203. The report also dealt with formal declarations or acts whereby States express their position with regard to territories whose status was disputed (Turkish Republic of North Cyprus, Timor-Leste, etc.) or with regard to a state of war.

204. Another category of acts relates to those by which a State waives a right or a legal claim, including waivers involving abdication or transfer.

205. The jurisprudence of international courts leads to the conclusion that a State may not be presumed to have waived its rights. Silence or acquiescence is not sufficient for a waiver to produce effects (ICJ, *United States Nationals in Morocco* case).[475] In order for a waiver to be acceptable, it must be the result of unequivocal acts (PCIJ, *Free Zones of Upper Savoy and the District of Gex* case).[476]

206. A third category related to protest, or the unilateral declaration whereby a protesting State makes it known that it does not recognize the legality of the acts to which the protest relates or that it does not accept the situation that such acts have created or threatened to create. Protest

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[474] V. Coussirat-Coustère and P.M. Eisemann, *Répertoire de la jurisprudence arbitrale internationale*, vol. I, 1784-1918 (Dordrecht, Boston, London, 1989), p. 54.

[475] *I.C.J. Reports*, 1952.

[476] *P.C.I.J., Series A/B*, No. 46, p. 96.

therefore has the opposite effect from that of recognition: it may consist of repeated acts and it must be specific, except in the case of serious breaches of international obligations or when it arises out of peremptory rules of international law. The report cites several examples of protests, some of which relate to the existence of a territorial or other dispute between States.

207. The final category dealt with in the report relates to State conduct that may produce legal effects similar to those of unilateral acts. Such conduct may result in recognition or non-recognition, protest against the claims of another State or even waiver.

208. The report also considered silence and estoppel, which are closely linked to unilateral acts, despite the fact that the legal effects of silence have often been disputed.

209. The report's conclusions aimed to facilitate the study of the topic and to establish some generally applicable principles. Although the examples cited were based on generally accepted categories of unilateral acts, the Special Rapporteur suggested that a new definition of unilateral acts could be formulated, taking as a basis the definition provisionally adopted at the fifty-fifth session and taking into account forms of State conduct producing legal effects similar to those of unilateral acts.

2. Summary of the debate

210. Several members expressed their satisfaction with the seventh report and the wealth of practice it described. Some members recalled that, given the density of the report, the Commission had had the right idea when it had requested the Special Rapporteur to devote the seventh report to State practice. However, the concept of a unilateral act had still not been analysed rigorously enough. Moreover, some members and some States had stated in the Sixth Committee that they were not convinced that the topic should be the subject of draft articles. One point of view was that the Commission should select certain aspects on which to carry out studies explaining State practice and the applicable law.

211. The opinion was expressed that certain categories of unilateral acts, such as promise, continued to give rise to problems and that the term used by the author State to qualify its conduct should not be taken into account. The categories selected were not that clear cut. The view was expressed that recognition and the recognition of States or Governments should be excluded from the study because it was not to be assumed that the General Assembly regarded

that sensitive issue as part of the topic of unilateral acts. In this context it was pointed out that recognition of States and Governments formed a separate item in the original list of topics for codification. According to another point of view, however, the legal effects of recognition and non-recognition should be included in the study.

212. It was noted that the concept of international legal obligations assumed by the author State of the declaration vis-à-vis one or more other States should be adopted as a criterion rather than that of legal effects, the latter notion being far broader. Unilateral acts should thus be studied as a source of international law; there was not very much practice in that regard and the International Court of Justice's decision in the *Nuclear Tests* case[477] was an isolated case.

213. It was also stated that the Special Rapporteur had fulfilled the task entrusted to him by the Commission. One might nevertheless feel somewhat confused and wonder whether the Commission had reached a stalemate. It would probably have been better not to have made the mistake of choosing the method of dealing with unilateral acts on the same basis as treaties.

214. It was pointed out that the way in which classification was used could be called into question, particularly the Special Rapporteur's tendency to present as unilateral acts stricto sensu forms of conduct having legal effects similar to those of unilateral acts.

215. According to some members, the report, which was full of examples of de facto and de jure situations taken from practice (some of which were not really relevant), was missing an analysis of the examples cited. The report did not provide an answer to the question asked in the Working Group's recommendation 6, i.e. what the reasons were for the unilateral act or conduct of the State. The other questions in the recommendation, namely, what the criteria for the validity of the express or implied commitment of the State were and in which circumstances and under which conditions a unilateral commitment could be modified or withdrawn had not been taken up. Additional information and an in-depth analysis were needed to be able to answer those questions, even where there was not a great deal of relevant practice. Recent

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[477] *I.C.J. Reports*, 1974.

examples from the proceedings before the International Court of Justice (*Application of the Convention on the Protection and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*))[478] showed that the question of the competence of State organs to engage the State through unilateral acts was complex.

216. Other members also questioned whether some of the many cases of which examples had been provided did not constitute political acts. In that respect, it was admitted that it was very difficult to tell the difference between political acts and legal acts in the absence of objective criteria and this would be one of the tasks of the Commission. The main element of the definition chosen in recommendation 1, namely, the intention of the State which purports to create obligations or other legal effects under international law, was subjective in nature. How could that intention be determined objectively? From that point of view, several of the examples given in the report were nothing more than acts or declarations of a political nature which were not intended to have legal effects. The purpose of the act would be an important factor in determining its nature - a case in point being the recognition of States or Governments. If there was no means of determining the nature of the act, the principle of the non-limitation of sovereignty or of restrictive interpretation should be taken into consideration. It was difficult, if not impossible, to identify unilateral acts stricto sensu (some writers considered that they were not a source of law insofar as there was always acceptance on the part of their addressees); however, the idea of a thematic study or an expository study warranted consideration. As to the criteria for the validity of unilateral acts or the conditions for their modification or withdrawal, it might well be asked whether the analogy with treaties was not altogether relevant or satisfactory, since, for example, the concepts of *jus dispositivum* or reciprocity would not play the same role. The flexibility of unilateral undertakings was something that could be looked into more closely.

217. According to another point of view, the term "unilateral act" covered a wide range of legal relations or procedures used by States in their conduct towards other States. Acts meant conduct and conduct includes silence and acquiescence. Conduct can also be intended to create legal relations or to bring the principle of good faith into play. Recognition, could include legal

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[478] *I.C.J. Reports*, 1996, p. 595.

or political recognition. The usual terminology was not very helpful; a possible approach would be to look for relevant criteria. In that connection, silence and estoppel, which had been invoked in some cases before the International Court of Justice, including in the *Delimitation of the Maritime Boundaries in the Gulf of Maine* case,[479] should be taken into account.

218. It was also recalled that the jurisprudence of the International Court of Justice, both in the *Nuclear Tests and Frontier Dispute (Burkina Faso/Republic of Mali)*[480] cases, placed considerable emphasis on the intention of the author State of declarations to be able to create legal obligations. It could not be denied that unilateral acts existed and could create an entire bilateral or multilateral system of relations whose mechanism was not always clear or even evident. The study should be continued with a view to deriving legal rules from the material considered; the draft definition of unilateral acts offered a useful basis, but all the categories referred to by the Special Rapporteur should be reconsidered for that purpose. The final form the study should take would depend on the assessment of State practice and the conclusions to be drawn therefrom. In the absence of a draft convention, consideration might be given to the possibility of flexible guidelines.

219. The Special Rapporteur's preliminary conclusions contained some useful pointers, but a fuller analysis had been required in order to conclude that there were generally applicable rules or a legal regime comparable to that established by the Vienna Convention on the Law of Treaties.

220. It was also noted that some matters of substance had been raised in the presentation of practice, such as the question whether conditionality was compatible with a unilateral act stricto sensu. Conditionality could be a determining factor in the motives for the formulation of a unilateral act. The purpose of the act also had to be taken into consideration, since it was indicative of the political or legal nature of the act; the Commission should, of course, confine itself to investigating legal unilateral acts; in addition, the purpose of an act might determine

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[479] *I.C.J. Reports*, 1984.

[480] *I.C.J. Reports*, 1986, p. 554.

whether it was autonomous and that, in turn, was crucial for the very qualification of an act as unilateral. Any future regime should contain a provision that was equivalent to article 18 of the Vienna Convention on the Law of Treaties in order to ensure a balance between freedom of action and the security of inter-State relations. Other aspects, such as the withdrawal of a unilateral act, possibly subject to the beneficiary's consent, might also be considered.

221. The autonomy of a unilateral act thus precludes any act undertaken in the framework of conventional or joint relations or connected with customary or institutional law. The specific nature of a unilateral act as a source of international law depended on criteria such as the intention of the author State and the status of the addressee as a subject of international law and the modalities whereby and the framework within which the act was formulated.

222. It was also pointed out that, although practice contained a wealth of examples and constituted an unavoidable reference source, it was still necessary to explore the reactions prompted by such acts, particularly promises, and especially in the case when they had not been honoured. Could the international responsibility of the author of the promise be invoked? An examination of practice from that standpoint might reveal whether unilateral acts could give rise to international legal obligations for the author State. The International Court of Justice had considered the legal scope of such acts (*Military and Paramilitary Activities in and against Nicaragua* case[481] or *Frontier Dispute (Burkina Faso/Republic of Mali)* case[482]). Protests against unilateral acts, such as that lodged by the United States of America in 1993 against maritime claims contained in the Islamic Republic of Iran's legislation, should also be analysed in greater detail. Even when protests were filed on the basis of a treaty (for example, the United Nations Convention on the Law of the Sea), they were still, in certain cases, a source of international law. A comprehensive study of the "lifespan" of, or background to, a unilateral act would therefore shed light on its particular features and might make it possible to identify the legal rules applicable to them.

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[481] *I.C.J. Reports*, 1984 and 1986.

[482] *I.C.J. Reports*, 1986, p. 554.

223. In that respect, it would be necessary to consider unilateral acts stricto sensu, i.e. those which purported to produce legal effects. There was no reason to abide scrupulously by the categories of unilateral acts mentioned by the Special Rapporteur, but it would be advisable to determine how best to pursue the study of unilateral acts.

224. It was also noted that the criterion for unilateral acts should be the concept of an international legal obligation and not that of their legal effects, which was a broader and vaguer concept applying to all unilateral acts of States, whether or not they were autonomous, since all those acts produced legal effects which varied considerably from one act to another.

225. The opinion was expressed that a distinction should perhaps be drawn between acts creating obligations and acts reaffirming rights. The lack of a unitary concept of unilateral acts made classification difficult. Perhaps a typology consisting of an ad hoc list of subprinciples, which should be studied separately, would be more useful.

226. The Commission should also reassure States about its intentions by dealing painstakingly with the topic. In that connection, a State's intention to enter into a unilateral commitment at the international level had to be absolutely clear and unambiguous.

227. According to another viewpoint, it would be regrettable to exclude a priori unilateral acts adopted within the framework of a treaty regime (for example, practices following ratification).

228. The revocability of a unilateral act should also be examined in detail. By its very nature, a unilateral act, was said to be freely revocable unless it explicitly excluded revocation or, before the act was revoked, it became a treaty commitment following its acceptance by the beneficiary of the initial act.

229. Other questions, such as that of the bodies which had the power to bind States by unilateral acts or that of the conditions governing the validity of those acts, could be settled by reference to the Vienna Convention on the Law of Treaties.

230. The opinion had been expressed that several declarations mentioned as examples in the report constituted only political declarations which did not purport to produce legal effects and were an integral part of diplomacy and inter-State relations.

231. The description of State practice in the report showed how hard it would be to draw general conclusions applicable to all the different types of acts mentioned. For example, acts of recognition had specific legal consequences which set them apart from other categories of acts. The Commission should therefore analyse those acts one by one and draw separate conclusions, due account being taken of the specific features of each act.

232. It was unclear to what extent it would be possible to identify the precise legal consequences of unilateral conduct. Given the great diversity of such conduct, the Commission should be extremely cautious in formulating recommendations in that regard. According to another point of view, unilateral acts did not constitute an institution or a legal regime and therefore did not lend themselves to codification, since the latter consisted in the formulation of the relevant concepts. It was precisely those concepts which were lacking when it came to unilateral acts, each of which was separate and independent.

233. Some members expressed the opinion that some references to the practice of certain entities as being examples of unilateral acts of States were wrong, since those entities were not States. The view was expressed that some of the cases referred to in the report in relation to Taiwan as a subject of international law were not in keeping with General Assembly resolution 2758 (XXVI) and should therefore not have been included.

234. It was also pointed out that it was not entirely correct to say that the solemn declarations made before the Security Council concerning nuclear weapons were without legal value. That showed just how complex and difficult the topic was. Even if the report gave examples of several types of declarations that might not all come within the definition of unilateral acts stricto sensu, moreover, it was not enough simply to cite such declarations: in order to determine whether the intention had been to produce legal effects, the context of the

declarations, both ex ante and ex post, had to be taken into account, as the *Nuclear Tests* cases[483] had shown. The report provided next to no information on that subject. In addition, the classification was made according to traditional categories and a priori contained no indications of how it should be used; instead of the deductive method requested by the Working Group, the Special Rapporteur had adopted an inductive method. An act could belong to several categories at once (for example, a promise to repay a debt could be viewed as a waiver, a promise or the recognition of certain rights). More generally, a "teleological" classification did not lead to constructive conclusions. A distinction should also be drawn between acts by which States committed themselves of their own volition and conduct by which States committed themselves without expressing their will and, initially, only the first group of acts should be considered.

235. An analysis of context, which was essential to an understanding of unilateral acts, was often lacking. Hence the need to concentrate from now on analysing examples and trying to draw up a comparative table including information on the author of the act, its form, objective, purpose and motives, the reactions of third parties, possible modifications, withdrawal (if applicable) and its implementation. The purpose of the table would be to identify rules that were common to the acts studied. As to the autonomy of unilateral acts, it had been pointed out that no unilateral act was completely autonomous. Legal effects always derived from pre-existing rules or principles. Some members pointed out that autonomy was a controversial element that should be excluded from the definition, although the non-dependent nature of the acts should be acknowledged.

236. A number of members thought that a working group could be set up again in order to clarify the methodology of the next stage of the study and to carry out a critical evaluation of practice.

237. The working group would be encouraged to continue its work on the basis of the recommendations made the previous year and to focus on the direction of future work. In

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[483] *I.C.J. Reports*, 1974.

addition, State practice should continue to be collected and analysed, with an emphasis, inter alia, on the criteria for the validity of the State's commitment and the circumstances under which such commitments could be modified or withdrawn. The working group should select and analyse in depth salient examples of unilateral acts aimed at producing legal effects (in conformity with the definition adopted at the fifty-fifth session).

3. Special Rapporteur's concluding remarks

238. At the end of the discussion, the Special Rapporteur pointed out that the seventh report was only an initial overview of the relevant State practice which was to be expanded upon by a study of the way certain acts identified in the report had developed and of others that remained to be identified.

239. The evolution, lifespan and validity of such acts could be dealt with in the next report, which would have to attempt to reply to the questions raised in recommendation 6 adopted by the Working Group at the fifty-fifth session. The Commission's discussions once again highlighted the complexity of the subject and the difficulties involved in the codification and progressive development of rules applicable to unilateral acts. Irrespective of the final form the work would take, the topic warranted in-depth consideration in view of its growing importance in international relations.

240. In order to settle the question of the nature of a declaration, act or conduct of a State and whether such acts produced legal effects, the will of the State to commit itself must be determined. That called for an interpretation based on restrictive criteria.

241. Whether they were considered sources of international law or sources of international obligations, unilateral acts stricto sensu were nonetheless a form of creation of international law. A unilateral act was part of a bilateral or multilateral relationship, even if that relationship could not be described as a treaty arrangement.

242. Reference to acts of recognition could facilitate the study of conditional unilateral acts and their various aspects (their application, modification or withdrawal).

243. As to the direction of future work, a more in-depth study of practice could be carried out by looking into specific issues such as those raised by certain speakers (author, form, subject, reaction, subsequent evolution, etc.) and studying some specific aspects that could be derived primarily from court decisions and arbitral awards.

244. The next report would take account of the conclusions or recommendations to be formulated by the Working Group, if it was established.

4. Conclusions of the Working Group

245. At its 2818th meeting on 16 July 2004, the Commission established an open-ended Working Group on Unilateral Acts of States, chaired by Mr. Alain Pellet. The Working Group held four meetings.

246. At its 2829th meeting on 5 August 2004, the Commission took note of the oral report of the Working Group.

247. The Working Group agreed to retain a sample of unilateral acts sufficiently documented to allow for an analysis in depth. It also established a grid which would permit to use uniform analytical tools.[484] The members of the Working Group shared a number of studies which would

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[484] The Grid included the following elements:

- Date
- Author/Organ
- Competence of author/organ
- Form
- Content
- Context and Circumstances
- Aim
- Addressees
- Reactions of Addressees
- Reactions of third parties

be effected in accordance with the established grid. These studies should be transmitted to the Special Rapporteur before 30 November 2004. It was decided that the synthesis, on the basis of these studies exclusively, would be entrusted to the Special Rapporteur who would take them into consideration in order to draw the relevant conclusions in his eighth report.

- Basis
- Implementation
- Modification
- Termination/Revocation
- Legal scope
- Decision of a judge or an arbitrator
- Comments
- Literature.

CHAPTER IX

RESERVATIONS TO TREATIES

A. Introduction

248. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

249. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet, Special Rapporteur for the topic.[485]

250. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[486]

251. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[487] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

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[485] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[486] A/CN.4/470 and Corr.1

[487] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

252. In 1995, the Commission, in accordance with its earlier practice,[488] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[489]

253. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report on the topic.[490] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[491] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

254. At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic.

255. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[492]

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[488] See *Yearbook … 1993*, vol. II (Part Two), para. 286.

[489] As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

[490] A/CN.4/477 and Add.1.

[491] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[492] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

256. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

257. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,[493] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[494]

258. At the fifty-first session, in 1999, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session and his fourth report on the topic.[495] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted in 1996 attached to his second report,[496] was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[497]

259. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

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[493] A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1.

[494] See *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 540.

[495] A/CN.4/499.

[496] A/CN.4/478/Rev.1.

[497] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

260. At the fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,[498] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative declarations. At the same session, the Commission provisionally adopted five draft guidelines.[499] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur contained in documents A/CN.4/508/Add.3 and Add.4 to the following session.

261. At the fifty-third session, in 2001, the Commission initially had before it the second part of the fifth report (A/CN.4/508/Add.3 and Add.4) relating to questions of procedure regarding reservations and interpretative declarations and then the Special Rapporteur's sixth report (A/CN.4/518 and Add.1 to 3) relating to modalities for formulating reservations and interpretative declarations (including their form and notification) as well as the publicity of reservations and interpretative declarations (their communication, addressees and obligations of depositaries).

262. At the same session the Commission provisionally adopted 12 draft guidelines.[500]

263. At the fifty-fourth session, in 2002, the Commission had before it the Special Rapporteur's seventh report (A/CN.4/526 and Add.1 to 3) relating to the formulation, modification and withdrawal of reservations and interpretative declarations. At the same session the Commission provisionally adopted 11 draft guidelines.[501]

264. At the same session, at its 2739th meeting held on 31 July 2002, the Commission decided to refer to the Drafting Committee draft guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of

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[498] A/CN.4/508/Add.1 to 4.

[499] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

[500] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 114.

[501] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 50.

reservations), 2.5.5 (Competence to withdraw a reservation at the international level), 2.5.5 bis (Competence to withdraw a reservation at the internal level), 2.5.5 ter (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.6 bis (Procedure for communication of withdrawal of reservations), 2.5.6 ter (Functions of depositaries), 2.5.7 (Effect of withdrawal of a reservation), 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), 2.5.9 (Effective date of withdrawal of a reservation) (including the related model clauses), 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of partial withdrawal of a reservation).

265. At the fifty-fifth session the Commission had before it the Special Rapporteur's eighth report (A/CN.4/535 and Add.1) relating to withdrawal and modification of reservations and interpretative declarations as well as to the formulation of objections to reservations and interpretative declarations.

266. At its 2760th meeting on 21 May 2003, the Commission considered and provisionally adopted 11 draft guidelines referred to the Drafting Committee at the fifty-fourth session.[502]

267. The Commission considered the Special Rapporteur's eighth report at its 2780th to 2783rd meetings from 25 to 31 July 2003.

268. At its 2783rd meeting on 31 July 2003, the Commission decided to refer draft guidelines 2.3.5 "Enlargement of the scope of a reservation",[503] 2.4.9 "Modification of interpretative declarations", 2.4.10 "Modification of a conditional interpretative declaration", 2.5.12 "Withdrawal of an interpretative declaration" and 2.5.13 "Withdrawal of a conditional interpretative declaration" to the Drafting Committee.

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[502] Draft guideline 2.3.5 was referred following a vote.

[503] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 329.

B. Consideration of the topic at the present session

269. At the present session the Commission had before it the Special Rapporteur's ninth report (A/CN.4/544) relating to the object and definition of objections. In fact this report constituted a complementary section to the eighth report on the formulation of objections to reservations and interpretative declarations.

270. The Commission considered the Special Rapporteur's ninth report at its 2820th, 2821st and 2822nd meetings from 21 to 23 July 2004.

271. At its 2822nd meeting, held on 23 July 2004, the Commission decided to refer draft guidelines 2.6.1 "Definition of objections to reservations" and 2.6.2 "Objection to the late formulation of widening of the scope of a reservation" to the Drafting Committee.

272. At its 2810th meeting, held on 4 June 2004 the Commission considered and provisionally adopted draft guidelines 2.3.5 ("Widening of the scope of a reservation"), 2.4.9 ("Modification of an interpretative declaration"), 2.4.10 ("Limitation and widening of the scope of a conditional interpretative declaration"), 2.5.12 ("Withdrawal of an interpretative declaration"), and 2.5.13 ("Withdrawal of a conditional interpretative declaration"). These guidelines had already been referred to the Drafting Committee at the fifty-fifth session.

273. At its 2829th meeting, held on 5 August 2005 the Commission adopted the commentaries to the aforementioned draft guidelines.

274. The text of these draft guidelines and the commentaries thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his ninth report

275. The Special Rapporteur introduced his ninth report, explaining that it was in fact a "corrigendum" to the second part of the eighth report (A/CN.4/535/Add.1), which dealt with the definition of objections (draft guidelines 2.6.1, 2.6.1 bis and 2.6.1 ter).

276. Although some of the criticism to which the draft guidelines had given rise in the Commission seemed well founded, he was convinced that the Guide to Practice had to define what was meant by "objections". As that term was not defined in the 1969

and 1986 Vienna Conventions, its definition was a matter for the progressive development of international law. The Special Rapporteur had originally taken the view that the definition of objections should be modelled on the definition of reservations; draft guideline 2.6.1 thus focused on the intention of the objecting State or international organization. During the debates in the Commission in 2003, some members indicated that that starting point was artificial because the effects of article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions on objections are often ambiguous and States may want their objections to produce effects different from those provided for by those texts. Thus, objections by which States claim to have a binding relationship with the author of the reservation under the treaty as a whole, including the provisions to which the reservation relates (objections with super maximum effect), were, in the Special Rapporteur's opinion, open to question because the entire law of reservations is dominated by the treaty principle and the idea that States cannot be bound against their will; the fact remains that such objections are still objections. Other types of objections included those by which a State indicates that it intends not to have a binding relationship with the author of the reservation not only under the provisions of the reservation, but also under a set of provisions which are not expressly referred to by the reservation (objections with intermediate effect).

277. In addition, the original definition proposed by the Special Rapporteur might give the impression that it prejudged the validity of objections and their effects. In order to take account of that criticism, the Special Rapporteur had "suggested" that the draft guideline in question should not be referred to the Drafting Committee. The Commission had also asked States a question on that point and, on the basis of the discussions held in 2003, the comments made in the Sixth Committee and his own thoughts on the matter, the Special Rapporteur had proposed a new definition of objections.[504]

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[504] Draft guideline 2.6.1 *Definition of objections to reservations*

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to modify the effects expected of the reservation [by the author of the reservation]."

278. That new definition was neutral, since it did not prejudge the effects an objection may have and left open the question whether objections which purport to have effects other than those provided for by the Vienna Conventions are or are not permissible. Since it was also based on the intention of the author of the objection, it was nevertheless not contrary to the provisions of articles 20 to 23 of the Vienna Conventions. It did not, however, indicate which category of States or international organizations could formulate objections or on which date the objections must or could be formulated; those were sensitive issues on which it would be better to draft separate guidelines.

279. The eighth report also contained two other draft guidelines, 2.6.1 bis ("Objection to late formulation of a reservation") and 2.6.1 ter ("Object of objections"). In the light of the proposed new definition, draft guideline 2.6.1 was no longer necessary, whereas draft guideline 2.6.1 bis was essential because it defined another meaning of the term "objection", which, as a result of the terminology used in draft guidelines 2.3.1 to 2.3.3, refers both to an objection to a reservation and to opposition to the late formulation or widening of the scope of the reservation, which is a different institution. This draft guideline was now numbered as 2.6.2.[505] The Special Rapporteur proposed that draft guidelines 2.6.1 and 2.6.2 should be referred to the Drafting Committee.

2. Summary of the debate

280. Several members commended the Special Rapporteur on his flexibility and willingness to reconsider draft guidelines which had given rise to comments and criticism. The new definition of objections contained in the ninth report took account of the criticism that had been levelled against the previous definition and the practice of States in respect of objections purporting to have effects other than those provided for by the Vienna Conventions.

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[505] Draft guideline 2.6.2 *Objection to the late formulation or widening of the scope of a reservation*

> "'Objection' may also mean the unilateral statement whereby a State or an international organization opposes the late formulation or widening of the scope of a reservation."

281. It was nevertheless pointed out that the result of an objection is usually not "to modify the effects expected of the reservation". As a general rule, no modification of these effects takes place. It would therefore be preferable not to base the definition on the intention of the objecting State, but to say that that State purports to indicate that it does not accept the reservation or considers it as invalid. Such a definition would distinguish between objections and mere "comments" on a reservation.

282. It was also considered preferable that the definition of objections should specify which States may formulate an objection and when they may do so, in accordance with article 23, paragraph 1, of the Vienna Conventions.

283. Several members expressed the opinion that the definition of objections must also include the objective of *preventing* a reservation from producing its effects. That term should therefore be added to the term "modify" in the definition.

284. It was also pointed out that the word "expected" was far too subjective and that a more precise term such as "intended" should be used instead. It must also be emphasized that the only relationship to be taken into account was that between the reserving State and the objecting State.

285. The view was expressed that the words "however phrased or named" did not belong in the definition of objections. According to another point of view, the words "purports to modify the effects expected of the reservation" introduced elements that went beyond the effects provided for by the Vienna Conventions: the objecting State excluded provisions of the treaty other than those to which the reservation related, in a spirit of "reprisals", thus departing from the Vienna Conventions.

286. It was also asked whether it was not too early to try to establish a definition of objections before having considered the effects of objections. It was even asked whether a definition of objections was necessary.

287. In any case the definition should exclude reactions that were not true objections, but rather, political declarations. The two reformulations of the initial proposal constituted steps in the right direction.

288. It was also pointed out that the provisions of the Vienna Conventions concerning objections were vague and needed to be clarified.

289. The treaty-based and voluntary character of the regime of objections should be preserved. An intention on the part of the objecting State to consider the treaty as binding in its entirety on the reserving State was contrary to that principle.

290. Only signatory States to the treaty could be entitled to formulate objections. That possibility accorded to them was a quid pro quo for their obligation not to defeat the object and purpose of a treaty prior to its entry into force. That question, however, could be dealt with in a separate guideline. Other members considered that the definition of objections could be considered before turning to the question of their legal effects, even though it would then have to be reconsidered subsequently in the light of the latter question. However, in the context of normative treaties (such as human rights treaties), certain objections might be without effect unless the objecting State refused to enter into a treaty relationship with the reserving State.

291. Several members endorsed draft guideline 2.6.2, stressing its usefulness. However, the view was expressed that the guideline should not be seen as encouraging the late formulation or widening of the scope of a reservation.

3. Special Rapporteur's concluding remarks

292. At the end of the debate, the Special Rapporteur noted that it had been of great interest. Although it concerned only a point of detail, it formed an integral part of his overall approach, which, he recognized, was slow, but which enabled questions to be considered in greater depth, allowing time for reflection. It was to be hoped that the guidelines in the Guide to Practice would be richer, more carefully pondered and more useful as a result of such an approach.

293. The Special Rapporteur stressed the following points:

(a) He had no doubts as to the usefulness of a defining objections at the current stage. That request exactly paralleled the one adopted with regard to the definition of reservations prior to any examination of their effects or lawfulness. In that regard, States that had commented on the question in the Sixth Committee had stressed the great value and practical importance of a definition of objections.

(b) Although the Vienna Conventions describe the "objective" effects of objections, none of the successive versions he had proposed did so, because the constant that had emerged from the debate at the previous and current sessions was that the definition of objections must be centred on the effects *intended by their author*.

(c) The questions of the time of formulation and the categories of States and international organizations able to formulate an objection were highly complex and sensitive matters which should be treated in separate guidelines.

(d) In the light of the debate, he envisaged some drafting changes to draft guideline 2.6.1, the most important of which would be the addition of the term "prevent" before the word "modify". On the other hand, he did not think it wise to use only the term "prevent", as a practice had developed whereby States objecting to a reservation excluded, in their relations with the reserving State, provisions of the treaty other than those to which the reservation related. Such an attitude does not prevent the reservation from producing effects, but those effects go beyond what the author of the reservation had wished. In other words, the objecting State accepts the reservation, but draws consequences from it that go beyond what the author of the reservation would have wanted. It was in that sense that he had used the term "modification". Without taking a position on the question whether such objections were or were not valid, he thought that, prima facie, they fell within the consensual framework on which the Vienna regime was based, unlike reservations with super maximum effect, which diverged from it.

(e) Another version of draft guideline 2.6.1, to take account of the various comments made during the debate, could read as follows:

> "*Definition of objections to reservations*
>
> 'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization [in response to] [which opposes] a reservation to a treaty [made] [formulated] by another State or international organization, whereby the objecting State or organization purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection."

(f) Lastly, draft guideline 2.6.2, which distinguished between the two meanings of the term "objection", had met with almost unanimous approval.

C. Text of draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of draft guidelines

294. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to Practice

Explanatory note[506]

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[507]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

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[506] For the commentary see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[507] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

1.1.1 [1.1.4][508] Object of reservations[509]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[510]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[511]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[512]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

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[508] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[509] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[510] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

[511] For the commentary to this draft guideline, see ibid., pp. 206-209.

[512] For the commentary to this draft guideline, see ibid., pp. 209-210.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[513]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means[514]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[515]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[516]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

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[513] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

[514] For the commentary to this draft guideline, see ibid., pp. 222-223.

[515] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[516] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

1.2 Definition of interpretative declarations[517]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[518]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[519]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[520]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

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[517] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[518] For the commentary to this draft guideline, see ibid., pp. 240-249.

[519] For the commentary to this draft guideline, see ibid., pp. 249-252.

[520] For the commentary to this draft guideline, see ibid., pp. 252-253.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[521]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name[522]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[523]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[524]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

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[521] For the commentary to this draft guideline, see ibid., pp. 254-260.

[522] For the commentary to this draft guideline, see ibid., pp. 260-266.

[523] For the commentary to this draft guideline, see ibid., pp. 266-268.

[524] For the commentary to this draft guideline, see ibid., pp. 268-270.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[525]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[526]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[527]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[528]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

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[525] For the commentary to this draft guideline, see ibid., pp. 270-273.

[526] For the commentary to this draft guideline, see ibid., pp. 273-274.

[527] For the commentary to this draft guideline, see ibid., pp. 275-280.

[528] For the commentary to this draft guideline, see ibid., pp. 280-284.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[529]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause[530]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[531]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

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[529] For the commentary to this draft guideline, see ibid., pp. 284-289.

[530] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[531] For the commentary to this draft guideline, see ibid., pp. 247-252.

1.5 Unilateral statements in respect of bilateral treaties[532]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[533]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[534]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of bilateral treaty by the other party[535]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[536]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

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[532] For the commentary, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[533] For the commentary to this draft guideline, see ibid., pp. 290-302.

[534] For the commentary to this draft guideline, see ibid., pp. 302-306.

[535] For the commentary to this draft guideline, see ibid., pp. 306-307.

[536] For the commentary to this draft guideline, see ibid., pp. 308-310.

1.7 Alternatives to reservations and interpretative declarations[537]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[538]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations[539]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

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[537] For the commentary see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[538] For the commentary to this draft guideline, see ibid., pp. 253-269.

[539] For the commentary to this draft guideline, see ibid., pp. 270-272.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[540]

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation[541]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[542]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

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[540] For the commentary to this draft guideline, see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63-67.

[541] For the commentary to this draft guideline, see ibid., pp. 67-69.

[542] For the commentary to this draft guideline, see ibid., pp. 69-75.

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 bis, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[543]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations[544]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

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[543] For the commentary to this draft guideline, see ibid., pp. 75-79.

[544] For the commentary to this draft guideline, see ibid., pp. 80-93.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[545]

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[546]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

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[545] For the commentary to this draft guideline, see ibid., pp. 94-104.

[546] For the commentary to this draft guideline, see ibid., pp. 105-112.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

(*b*) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] Procedure in case of manifestly [impermissible] reservations[547]

Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.2.1 Formal confirmation of reservations formulated when signing a treaty[548]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

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[547] For the commentary to this draft guideline, see ibid., pp. 112-114.

[548] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[549]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[550]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty …[551]

2.3.1 Late formulation of a reservation[552]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[553]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

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[549] For the commentary to this draft guideline, see ibid., pp. 472-474.

[550] For the commentary to this draft guideline, see ibid., pp. 474-477.

[551] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[552] For the commentary to this draft guideline, see ibid., pp. 477-489.

[553] For the commentary to this draft guideline, see ibid., pp. 490-493.

2.3.3 Objection to late formulation of a reservation[554]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[555]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

2.3.5 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.[556]

2.4 Procedure for interpretative declarations[557]

2.4.1 Formulation of interpretative declarations[558]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

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[554] For the commentary to this draft guideline, see ibid., pp. 493-495.

[555] For the commentary to this draft guideline, see ibid., pp. 495-499.

[556] For the commentary see Section C.2 below.

[557] For the commentary see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[558] For the commentary to this draft guideline, see ibid., pp. 115-116.

[2.4.2 [2.4.1 bis] Formulation of an interpretative declaration at the internal level[559]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[560]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[561]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[562]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by

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[559] For the commentary to this draft guideline, see ibid., pp. 117-118.

[560] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

[561] For the commentary to this draft guideline, see ibid., pp. 501-502.

[562] For the commentary to this draft guideline, see ibid., pp. 502-503.

the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[563]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[564]

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

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[563] For the commentary to this draft guideline, see ibid., pp. 503-505.

[564] For the commentary to this draft guideline, see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

2.4.8 Late formulation of a conditional interpretative declaration[565]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2.4.9 Modification of an interpretative declaration[566]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[567]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

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[565] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

[566] For the commentary see Section C.2 below.

[567] For the commentary to this draft guideline, see ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190-201.

2.5.2 Form of withdrawal[568]

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations[569]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[570]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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[568] For the commentary to this draft guideline, see ibid., pp. 201-207.

[569] For the commentary to this draft guideline, see ibid., pp. 207-209.

[570] For the commentary to this draft guideline, see ibid., pp. 210-218.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[571]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[572]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

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[571] For the commentary to this draft guideline, see ibid., pp. 219-221.

[572] For the commentary to this draft guideline, see ibid., pp. 221-226.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[573]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[574]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses[575]

A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

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[573] For the commentary to this draft guideline, see ibid., pp. 227-231.

[574] For the commentary to this draft guideline, see ibid., pp. 231-239.

[575] For the commentary to this model clause, see ibid., p. 240.

B. Earlier effective date of withdrawal of a reservation[576]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[577]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[578]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] Partial withdrawal of a reservation[579]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

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[576] For the commentary to this model clause, see ibid., pp. 240-241.

[577] For the commentary to this model clause, see ibid., pp. 241-242.

[578] For the commentary to this draft guideline, see ibid., pp. 242-244.

[579] For the commentary to this draft guideline, see ibid., pp. 244-256.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[580]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of an interpretative declaration[581]

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

2.5.13 Withdrawal of a conditional interpretative declaration[582]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2. Text of the draft guidelines with commentaries thereto

295. The text of the draft guidelines together with commentaries thereto provisionally adopted by the Commission at its fifty-sixth session are reproduced below.

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[580] For the commentary to this draft guideline, see ibid., pp. 256-259.

[581] For the commentary to this draft guideline, see Section C.2 below.

[582] Ibid.

2.3.5 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

Commentary

(1) The question of the modification of reservations should be posed in connection with the questions of the withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the initial reservation, which poses no problem in principle, being subject to the general rules concerning withdrawals; the provisions of draft guidelines 2.5.10 and 2.5.11 apply.[583] However, if the effect of the modification is to widen an existing reservation, it would seem logical to start from the notion that what is involved is the late formulation of a reservation and to apply to it the rules which are applicable in this regard and which are stated in draft guidelines 2.3.1 to 2.3.3.[584]

(2) This is the reasoning forming the basis for draft guideline 2.3.5, which refers to the rules on the late formulation of reservations and also makes it clear that, if a State makes an "objection" to the widening of the reservation, the initial reservation applies.

(3) These assumptions were contested by a minority of the members of the Commission, who took the view that these rules run counter to the Convention on the Law of Treaties and it risked unduly weakening the treaty rights of States. In addition, the established practice of the Council of Europe seems to be to prohibit any "widening" modification.

(4) Within the Council framework, "[t]here have been instances where States have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which

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[583] See these draft guidelines and the commentaries thereto in *Official Records of the Genera Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 244-259.

[584] For the text of these provisions and the commentaries thereto, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477-495.

would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations … Allowing such modifications would create a dangerous precedent which would jeopardize legal certainty and impair the uniform implementation of European treaties".[585]

(5) The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it subsequently with widened reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.[586]

(6) The majority of the members of the Commission nevertheless considered that a regional practice (which is, moreover, absolutely not settled[587]) should not be transposed to the universal level and that, as far as the widening of existing reservations is concerned, it would not be logical to apply rules that differ from those applicable to the late formulation of reservations.

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[585] Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, 1999, p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos et al. v. Turkey* (decision of 4 March 1991, applications Nos. 15299/89, 15300/89 and 15318/89, *R.U.D.H.* 1991, p. 193).

[586] Ibid. One can interpret in this sense the Swiss Federal Court decision of 17 December 1992 in the case of *Elisabeth B. v. Council of State of Thurgau Canton* (*Journal des Tribunaux*, vol. I: *Droit Fédéral*, 1995, pp. 523-537); see the seventh report on reservations to treaties, A/CN.4/526/Add.3, paras. 199-200. On the same point, see J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'art. 6, § 1", *R.U.D.H.* 1993, p. 303. In this regard, it may be noted that, on 26 May 1998, Trinidad and Tobago denounced the Optional Protocol and ratified it again the same day with a new reservation (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2003*, ST/LEG/SER.E/22, vol. I, chap. IV.5, p. 222, note 3). After several objections and a decision by the Human Rights Committee dated 31 December 1999 (Communication No. 845/1999, CCPR/C/67/D/845/1999 - see the fifth report on reservations to treaties, A/CN.4/508, para. 12), Trinidad and Tobago again denounced the Protocol on 27 March 2000 (*Multilateral Treaties …*, ibid.). What was involved, however, was not the modification of an existing reservation, but the formulation of an entirely new reservation.

[587] See the commentary to draft guideline 2.3.1 in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 485, para. (14), footnote 1164.

(7) If, after expressing its consent, together with a reservation, a State or an international organization wishes to "widen" the reservation, in other words, to modify in its favour the legal effect of the provisions of the treaty to which the reservation refers, such provisions will be fully applicable, for the same reasons:

- It is essential not to encourage the late formulation of limitations on the application of the treaty;

- On the other hand, there may be legitimate reasons why a State or an international organization would wish to modify an earlier reservation and, in some cases, it may be possible for the author of the reservation to denounce the treaty in order to ratify it again with a "widened reservation";

- It is always possible for the parties to a treaty to modify it at any time by unanimous agreement;[588] it follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to that party; and

- The requirement of the *unanimous* consent of the other parties to the widening of the scope of the reservation seems to constitute an adequate safeguard against abuses.

(8) At least at the universal level, moreover, the justified reluctance not to encourage the States parties to a treaty to widen the scope of their reservations after the expression of their consent to be bound has not prevented practice in respect of the widening of reservations from being based on practice in respect of the late formulation of reservations,[589] and this is entirely a matter of common sense.

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[588] Cf. art. 39 of the 1969 and 1986 Vienna Conventions.

[589] G. Gaja gives the example of the "correction" by France on 11 August 1982 of the reservation formulated in its instrument of approval of the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which it deposited with the Secretary-General of the International Maritime Organization on 25 September 1981 ("Unruly Treaty Reservations", *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Giuffrè, Milan, 1987, vol. I, pp. 311-312). This is a somewhat

(9) Depositaries treat "widening modifications" in the same way as late reservations. When they receive such a request by one of the parties, they consult all the other parties and accept the new wording of the reservation only if none of the parties opposes it by the deadline for replies.

(10) For example, when Finland acceded to the 1993 Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals of 1968, on 1 April 1985, it formulated a reservation to a technical provision of the instrument.[590] Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than that originally mentioned:[591]

> "In keeping with the practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged. None of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is, on 19 March 1996."[592]

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unusual case, since, at the time of the "correction", the MARPOL Protocol had not yet entered into force with respect to France; in this instance, the depositary does not appear to have made acceptance of the new wording dependent on the unanimous agreement of the other parties, some of which did in fact object to the substance of the modified reservation (see *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions as at 31 December 2002*, J/2387, p. 81).

[590] In its original reservation with respect to para. 6 of the annex, Finland reserved "the right to use yellow colour for the continuous line between the opposite directions of traffic" (*Multilateral Treaties …*, vol. I, XI.B.25, p. 830).

[591] "… the reservation made by Finland also applies to the barrier line" (ibid., pp. 830-831).

[592] Ibid., note 586.

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations.[593] [594]

(11) As another example, the Government of Maldives notified the United Nations Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that:

> "… reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law, it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification."[595]

(12) However, just as it had not objected to the formulation of the original reservation by Maldives by opposing its entry into force as between the two States, so Germany did not formally oppose the modification as such. This reinforces the doubts of some members of the Commission as to whether the term "objection" should be used to refer to the opposition of States to late modification of reservations. A State might well find the modification *procedure*

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[593] See the commentary to draft guideline 2.3.1 ("Late formulation of a reservation"), *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), paras. (11) and (13), pp. 484-485.

[594] It should be noted that, at present, the period would be 12 months, not 90 days (see draft guideline 2.3.2 ("Acceptance of late formulation of a reservation"), ibid., p. 489 and, in particular, paras. (5) to (10) of the commentary, ibid., pp. 490-493.

[595] *Multilateral Treaties* …, vol. I, chap. IV.8, notes 35, 42, p. 237. For Germany's original objection, see p. 248. Finland also objected to the modified Maldivian reservation, ibid., p. 245. The German and Finnish objections were made more than 90 days after the notification of the modification, the deadline set at that time by the Secretary-General.

acceptable while objecting to the *content* of the modified reservation.[596] Since, however, contrary to the opinion of the majority of its members, the Commission decided to retain the word "objection" to refer to the opposition of States to late formulation of reservations in draft guidelines 2.3.2 and 2.3.3,[597] it considered that the same terminology should be used here.

(13) Draft guideline 2.3.5 refers implicitly to draft guidelines 2.3.1, 2.3.2 and 2.3.3 on the late formulation of reservations. It did not seem necessary to say so expressly in the text because these guidelines immediately precede it in the Guide to Practice.

(14) It should, however, be noted that the transposition of the rules applicable to the late formulation of reservations, as contained in draft guideline 2.3.3, to the widening of an existing reservation cannot be unconditional. In both cases, the existing situation remains the same in the event of an "objection" by any of the contracting parties, but this situation is different: prior to the late formulation of a reservation, the treaty applied in its entirety as between the contracting parties to the extent that no other reservations were made; in the case of the late widening of the scope of a reservation, however, the reservation was already established and produced the effects recognized by the Vienna Conventions. This is the difference of situation covered by the second sentence of draft guideline 2.3.5, which provides that, in this second case, the initial reservation remains unchanged in the event of an "objection" to the widening of its scope.

(15) The Commission did not consider it necessary for a draft guideline to define the "widening of the scope of a reservation" because its meaning is so obvious. Bearing in mind the definition of a reservation contained in draft guidelines 1.1 and 1.1.1, it is clear that this term applies to any modification designed to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole in respect of certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.

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[596] See para. (23) of the commentary to draft guideline 2.3.1, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489.

[597] See the text of these draft guidelines, ibid., p. 463.

2.4.9 Modification of an interpretative declaration

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

Commentary

(1) According to the definition given in draft guideline 1.2, "simple" interpretative declarations are merely clarifications of the meaning or scope of the provisions of the treaty. They may be made at any time[598] (unless the treaty otherwise provides[599]) and are not subject to the requirement of confirmation.[600] There is thus nothing to prevent them from being modified at any time in the absence of a treaty provision stating that the interpretation must be given at a specified time, as indicated in draft guideline 2.4.9, the text of which is a combination of the texts of draft guidelines 2.4.3 ("Time at which an interpretative declaration may be formulated") and 2.4.6 ("Late formulation of an interpretative declaration").

(2) It follows that a "simple" interpretative declaration may be modified at any time, subject to provisions to the contrary contained in the treaty itself, which may limit the possibility of making such declarations in time, or in the case which is fairly unlikely, but which cannot be ruled out in principle, where the treaty expressly limits the possibility of modifying interpretative declarations.

(3) There are few clear examples illustrating this draft guideline. Mention may be made, however, of the modification by Mexico, in 1987, of the declaration concerning article 16 of the International Convention against the Taking of Hostages of 17 December 1979, made upon accession in 1987.[601]

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[598] Cf. draft guideline 2.4.3.

[599] Cf. draft guideline 2.4.6.

[600] Cf. draft guideline 2.4.4.

[601] See *Multilateral Treaties* ..., vol. II, chap. XVIII.5, p. 109.

(4) The modification by a State of unilateral statements made under an optional clause[602] or providing for a choice between the provisions of a treaty[603] also comes to mind; but such statements are "outside the scope of the … Guide to Practice".[604] Also, on 7 March 2002, Bulgaria amended a declaration made upon signature and confirmed upon deposit of its instrument of ratification (in 1994) of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959;[605] however, strictly speaking, it might be considered that this was more a case of interpreting a reservation than modifying an interpretative declaration.[606]

(5) For all that, and despite the paucity of convincing examples, draft guideline 2.4.9 seems to flow logically from the very definition of interpretative declarations.

(6) It is obvious that, if a treaty provides that an interpretative declaration can be made only at specified times, it follows a fortiori that such a declaration cannot be modified at other times. In the case where the treaty limits the possibility of making or modifying an interpretative declaration in time, the rules applicable to the late formulation of such a declaration, as stated in

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[602] See, for example, the modification by Australia and New Zealand of the declarations made under art. 24, para. 2 (ii), of the Agreement establishing the Asian Development Bank upon ratification of that Agreement (*Multilateral Treaties ...*, vol. I, chap. X.4, pp. 509-511).

[603] See, for example, the note by the Ambassador of Mexico to the Hague dated 24 January 2002 informing the depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965 of the modification of Mexico's requirements with respect to the application of art. 5 of the said Convention (www.hcch.net/e/conventions/text14e.html).

[604] Draft guidelines 1.4.6 and 1.4.7.

[605] Http://conventions.coe.int/Treaty/EN/CADREListeTraites.htm.

[606] See also ibid.: the modification, in 1988, of the Swiss "interpretative declaration" of 1974 concerning art. 6, para. 1, of the European Convention on Human Rights following the *Belilos* judgment of 29 April 1988. However, the Court had classed this "declaration" as a reservation and Switzerland simply withdrew its declaration retroactively following the decision of the Swiss Federal Court of 17 December 1992 in the case of *Elisabeth B. v. Council of State of Thurgau Canton* (see footnote 586, supra).

draft guideline 2.4.6, should be applicable mutatis mutandis if, notwithstanding that limitation, a State or an international organization intended to modify an earlier interpretative declaration: such a modification would be possible only in the absence of an objection by any one of the other contracting parties.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

Commentary

(1) Unlike the modification of "simple" interpretative declarations, the modification of conditional interpretative declarations cannot be done at will: such declarations can, in principle, be formulated (or confirmed) only at the time of the expression by the State or the international organization of its consent to be bound[607] and any late formulation is excluded "except if none of the other contracting parties objects".[608] Any modification is thus similar to a late formulation that can be "established" only if it does not encounter the opposition of any one of the other contracting parties. This is what is stated in draft guideline 2.4.10.

(2) Although it may be difficult in some cases to determine whether the purpose of a modification is to limit or widen the scope of a conditional interpretative declaration, the majority of the members of the Commission were of the opinion that there was no reason to depart in this regard from the rules relating to the modification of reservations and that reference should therefore be made to the rules applicable respectively to the partial withdrawal[609] and to the widening of the scope of reservations.[610]

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[607] Cf. draft guidelines 1.2.1 and 2.4.5.

[608] Draft guideline 2.4.8.

[609] See draft guidelines 2.5.10 and 2.5.11.

[610] See draft guideline 2.3.5.

(3) In this second case, the applicable rules are thus also the same as the ones contained in draft guideline 2.4.8 on the "Late formulation of a conditional interpretative declaration", which reads:

> "A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting parties objects to the late formulation of the conditional interpretative declaration".[611]

(4) The Commission is aware of the fact that it is also possible that a party to the treaty might decide not to make an interpretative declaration a condition of its participation in the treaty while maintaining it "simply" as an interpretation. This is, however, an academic question of which there does not appear to be any example.[612] There is accordingly probably no need to devote a draft guideline to this case, particularly as this would, in reality, amount to the withdrawal of the declaration in question as a *conditional* interpretative declaration and would thus be a case of a simple withdrawal to which the rules contained in draft guideline 2.5.13 would apply, with the result that this could be done at any time.

2.5.12 Withdrawal of an interpretative declaration

An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose.

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[611] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506.

[612] There are, however, examples of statements specifying that earlier interpretative declarations do not constitute reservations. See, for example, the "communication received subsequently" (the date is not given) by which the Government of France indicated that the first paragraph of the "declaration" made upon ratification of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 "did not purport to limit the obligations under the Convention in respect of the French Government, but only to record the latter's interpretation of article 4 of the Convention" (*Multilateral Treaties* ..., vol. I, chap. IV.2, p. 137, note 19). See also, for example, the statements by Indonesia and Malaysia concerning the declarations which accompanied their ratifications of the Convention on the International Maritime Organization of 6 March 1948, ibid., vol. II, chap. XII.1, p. 6, notes 14 and 16, or India's position with respect to the same Convention (see ibid., p. 5, note 13; see also O. Schachter, "The question of treaty reservations at the 1959 General Assembly", 54 *A.J.I.L.* (1960), pp. 372-379).

Commentary

(1) It follows from draft guideline 2.4.3 that, except where a treaty provides otherwise,[613] a "simple" interpretative declaration "may be formulated at any time". It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure. It would, moreover, be paradoxical if the possibility of the withdrawal of an interpretative declaration was more limited than that of the withdrawal of a reservation, which could be done "at any time".[614]

(2) While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, the Government of Italy notified the Secretary-General that "it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Geneva Convention relating to the Status of Refugees of 28 July 1951] were recognized by it as recommendations only".[615] Likewise, "on 20 April 2001, the Government of Finland informed the Secretary-General [of the United Nations] that it had decided to withdraw its declaration in respect of article 7, paragraph 2, made upon ratification" of the 1969 Vienna Convention on the Law of Treaties (ratified by that country in 1977[616]).

(3) This practice is compatible with the very informal nature of interpretative declarations.

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[613] Cf. draft guideline 2.4.6.

[614] Cf. art. 22, para. 1, of the 1969 and 1986 Vienna Conventions and draft guideline 2.5.1.

[615] *Multilateral Treaties* ..., vol. I, chap. V.2, pp. 347, note 23. Doubts remain concerning the nature of this declaration. There are also withdrawals of "statements of non-recognition" (cf., for example, the withdrawal of the Egyptian declarations in respect of Israel concerning the 1966 International Convention on the Elimination of All Forms of Racial Discrimination or the Single Convention on Narcotic Drugs, following the Camp David Agreement in 1980, ibid., chap. IV.2, p. 136, note 18, or chap. VI.15, p. 406, note 18), but such statements are "outside the scope of the ... Guide to Practice" (draft guideline 1.4.3).

[616] Ibid., vol. II, chap. XXIII.1, p. 328, note 13. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties. See also the withdrawal by New Zealand of a declaration made upon ratification of the Agreement establishing the Asian Development Bank (ibid., vol. I, chap. X.4, p. 512, note 9).

(4) The withdrawal of an interpretative declaration must nevertheless be based on the few procedures provided for in draft guidelines 2.4.1 and 2.4.2 with regard to the authorities which are competent to formulate such a declaration (and which are the same as those which may represent a State or an international organization for the adoption or authentication of the text of the treaty or for expressing their consent to be bound). The wording used in draft guideline 2.5.12 implicitly refers to those provisions.

2.5.13 Withdrawal of a conditional interpretative declaration

The withdrawal of a conditional interpretative declaration is governed by the rules applicable to the withdrawal of reservations.

Commentary

(1) Unlike simple interpretative declarations, conditional interpretative declarations are governed insofar as their formulation is concerned by the legal regime of reservations: they must be formulated when the State or international organization expresses its consent to be bound,[617] except if none of the other contracting Parties objects to their late formulation.

(2) It follows inevitably that the rules applicable to the withdrawal of conditional interpretative declarations are necessarily identical to those applying reservations in this regard, and this can only strengthen the position that it is unnecessary to devote specific draft guidelines to such declarations. The Commission nevertheless believes that it would be premature to take a final decision in this regard as long as this "hunch" has not been verified in respect of the rules relating to the validity of both reservations and conditional interpretative declarations.

(3) Until a definite position has been taken on this problem of principle, the rules to which draft guideline 2.5.13 implicitly refers are those contained in draft guidelines 2.5.1 to 2.5.9.

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[617] See draft guideline 1.2.1.

CHAPTER X

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

A. Introduction

296. Following its consideration of a feasibility study[618] that had been undertaken on the topic entitled "Risks ensuing from fragmentation of international law" at its fifty-second session (2000), the Commission decided to include the topic in its long-term programme of work.[619] Two years later, at its fifty-fourth session (2002), the Commission included the topic in its programme of work and established a Study Group. It also decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[620] In addition, the Commission agreed on a number of recommendations, including on a series of studies to be undertaken, commencing with a study by the Chairman of the Study Group on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

297. At its fifty-fifth session (2003) session, the Commission appointed Mr. Martti Koskenniemi as Chairman of the Study Group. It set a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003-2006), distributed among members of the Study Group work on the other topics agreed upon in 2002,[621]

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[618] G. Hafner, "Risks Ensuing from Fragmentation of International Law", *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex.

[619] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. IX.A.1, para. 729.

[620] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. IX.A, paras. 492-494.

[621] (a) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (b) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (c) The modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); (d) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

and decided upon the methodology to be adopted for that work. The Commission likewise held a preliminary discussion of an outline produced by the Chairman of the Study Group on the question of "The function and scope of the *lex specialis* rule and the question of self-contained regimes".

B. Consideration of the topic at the present session

298. At the current session, the Commission reconstituted the Study Group, which held eight meetings on 12 and 17 May, on 3 June, on 15, 19, 21, 26 and 28 July 2004. It also had before it the Preliminary report on the Study on the Function and Scope of the *lex specialis* rule and the question of self-contained regimes (ILC(LVI)/SG/FIL/CRD.1 and Add.1) by Mr. Martti Koskenniemi, Chairman of the Study Group, as well as outlines on the Study on the Application of Successive Treaties relating to the same subject matter (Article 30 of the Vienna Convention on the Law of Treaties) (ILC(LVI/SG/FIL/CRD.2) by Mr. Teodor Melescanu; on the Study on the Interpretation of Treaties in the light of "any relevant rules of international law applicable in relations between parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community (ILC(LVI/SG/FIL/CRD.3/Rev.1) by Mr. William Mansfield; on the Study concerning the modification of multilateral treaties between certain of the parties only (Article 41 of the Vienna Convention on the Law of Treaties) (ILC(LVI/SG/FIL/CRD.4) by Mr. Riad Daoudi; and on the Study on Hierarchy in International Law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules (ILC(LVI/SG/FIL/CRD.5) by Mr. Zdzislaw Galicki.[622]

299. At its 2828th meeting, held on 4 August 2004, the Commission took note of the report of the Study Group.

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[622] The documents are available from the Codification Division of the Office of Legal Affairs.

C. Report of the Study Group

1. General comments and the projected outcome of the Study Group's work

300. The Study Group commenced its discussion by a review of the report of its 2003 session (A/58/10, paras. 415-435) as well as of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session, prepared by the Secretariat (A/CN.4/537, section G).

301. The Study Group affirmed its mandate as essentially encapsulated in the full title of the Study Group. The intention was to study both the positive and negative aspects of fragmentation as an expression of diversification and expansion of international law. The Study Group decided to carry out its task on the basis of the tentative schedule, programme of work and methodology agreed upon during the 2003 session (A/58/10, paras. 424-428).

302. The Study Group welcomed the comments made in the Sixth Committee during the fifty-eighth session of the General Assembly in 2003. It observed that the decisions concerning the direction of its work had been broadly endorsed. In particular, the decision to concentrate on the substantive questions and to set aside the institutional implications of fragmentation as well as the decision to focus work on the Vienna Convention on the Law of Treaties had seemed acceptable to the members of the Sixth Committee. The Study Group also took note of the wish to attain practical conclusions from its work. In this connection, the Study Group also discussed the question concerning the eventual result of its work. While some members saw the elaboration of guidelines, with commentaries, as the desired goal, others were sceptical of aiming for a normative direction. There was agreement, however, that the analytical exercise would already be useful and that at the least the Study Group should give its own conclusions, based on the studies, as to the nature and consequences of the phenomenon of "fragmentation" of international law. The Study Group confirmed that its intention was to develop a substantive, collective document as the outcome of its work. This document would be submitted to the Commission in 2006. It would incorporate much of the substance of the individual reports produced by the members of the Study Group, as supplemented and modified in the discussions in the Study Group. It would consist of two parts: (a) a substantive study on the topic as well as (b) a concise summary containing the proposed conclusions and, if appropriate, guidelines on how to deal with fragmentation.

2. Discussion of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes"

303. The Study Group began its substantive discussions on the study produced by the Chairman on "Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes'" (ILC(LVI)/SG/FIL/CRD.1 (7 May 2004) and Add.1 (4 May 2004)). The study was prefaced by a typology of fragmentation, based on the Study Group's decision in 2003. That typology made a distinction between three types of fragmentation: (a) through conflicting interpretations of general law; (b) through emergence of special law as exception to the general law and (c) through conflict between different types of special law. As these distinctions had already been endorsed in 2003, there was no need to have a discussion on them now. Instead, the Study Group decided to go directly to the substance of the study. The study was in two parts. The first part contained a discussion of the *lex specialis* maxim while the second part (Addendum 1) focused on "self-contained regimes".

(a) *Lex specialis*

304. In introducing the part of the study concerning the function and scope of the *lex specialis* rule, the Chairman stressed several points. First, he emphasized that recourse to the *lex specialis* rule was an aspect of legal reasoning that was closely linked to the idea of international law as a legal system. The *lex specialis* maxim sought to harmonize conflicting standards through interpretation or establishment of definite relationships of priority between them. In fact, he said, it was often difficult to distinguish between these two aspects of the functioning of the technique: the interpretation of a special law in the light of general law, and the setting aside of the general law in view of the existence of a conflicting specific rule. He underlined the relational character of the distinction between the general and the special. A rule was never "general" or "special" in the abstract but always in relation to some other rule. A rule's "speciality" might follow, for instance, from the scope of the States covered by it, or from the width of its subject matter. A rule (such as a good neighbourliness treaty) might be special in the former but general in the latter sense. The adoption of a systemic view was important precisely in order to avoid thinking of *lex specialis* in an overly formal or rigid manner. Its operation was always conditioned by its legal-systemic environment.

305. Secondly, the Chairman noted that the principle that special law derogated from general law was a traditional and widely accepted maxim of legal interpretation and technique for the resolution of conflict of norms. There was a wide case law that had recourse to the technique of *lex specialis*. The International Law Commission, too, had endorsed it in Article 55 of the draft articles of responsibility of States for internationally wrongful acts. The Chairman attributed the acceptance of the *lex specialis* rule to its argumentative power: it was pragmatic and provided greater clarity and definiteness, thus considered "harder" or more "binding" than the general rule. Further, it regulated the matter at hand more effectively and efficiently and its usefulness lay in providing better access to the will of parties.

306. Thirdly, the Chairman distinguished between four situations in which the *lex specialis* rule has arisen in case law: (a) it may operate to determine the relationship between two provisions (special and general) within a single instrument as was the case, for example, in the *Beagle Channel Arbitration*,[623] (b) between provisions in two different instruments as it was in the *Mavrommatis Palestine Concessions* case[624] and more typically in a systemic environment such as within the WTO,[625] (c) between a treaty and a non-treaty standard as was the case in *INA Corporation v. Government of the Islamic Republic of Iran*,[626] and

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[623] Case concerning a dispute between Argentina and Chile concerning the Beagle Channel 18 February 1977, *U.N.R.I.A.A.*, vol. XXI, p. 55. See also *52 I.L.R.* (1979), p. 97.

[624] *Mavrommatis Palestine Concessions* case, *P.C.I.J. Ser. A* No. 2 (1924), p. 31.

[625] See for example *Turkey - Restrictions on Imports of Textile and Clothing Products*, 31 May 1999, WT/DS34/R, para. 9.92; *Indonesia - Certain Measures Affecting the Automobile Industry*, 2 July 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.28; and *India - Qualitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, 6 April 1999, WT/DS90/R, para. 4.20. See also for instance within the EU, *JT's Corporation Ltd. v. Commission of the European Communities*, Court of First Instance, judgement 12 October 2000, ECJ, Case T-123/99 (2000), ECR II-3269, p. 3292 (para. 50).

[626] Iran-United States Claims Tribunal, INA Corporations, Case No. 161, 8 July 1985, Iran-U.S.CTR 1985-I, vol. 8, p. 378.

(d) between two non-treaty standards as shown by the *Right of Passage* case[627] in which analogous reasoning was applied although it was not expressed in the language of *lex specialis*.

307. Fourthly, the Chairman suggested that while there was no formal hierarchy between sources of international law, there was a kind of informal hierarchy which emerged pragmatically as a "forensic" or "natural" aspect of legal reasoning, preferring the special standard to the more general one. This pragmatic hierarchy, he suggested, expressed the consensual basis of international law: preference was often given to a special standard because it not only best reflects the requirements of the context, but because it best reflected the intent of those who were to be bound by it.

308. Fifthly, the Chairman pointed out that there were two ways in which the law took account of the relationship of a particular rule to a general one. In the first instance, a special rule could be considered to be an *application*, *elaboration* or *updating* of a general standard. In the second instance, a special rule is taken, instead, as a *modification*, *overruling* or *setting aside* of the general standard (i.e. *lex specialis* is an exception to the general rule). The Chairman emphasized that it was often impossible to say whether a rule should be seen as an "application" or "setting aside" of another rule. To some extent, this distinction - and with it, the distinction between *lex specialis* as a rule of interpretation and a rule of conflict-solution - was artificial. Both aspects were therefore relevant in the study of *lex specialis*. He stressed that even where the rule is used as a conflict-solution technique, it does not totally extinguish the general law but that the latter will remain "in the background" and affect the interpretation of the former.

309. Sixthly, the Chairman pointed out that most of general international law was dispositive - that is to say, that it could be derogated from by *lex specialis*. There were, however, cases where the general law expressly prohibited deviation or such prohibition is derived from the nature of the general law. The most well known of such cases was that of *jus cogens*. However, there were also other situations where no derogation was allowed.

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[627] *Right of Passage over Indian Territory (merits) (Portugal v. India), Judgment, I.C.J. Reports*, 1960, p. 44.

Pertinent considerations included for instance who the beneficiaries of the obligation were, and whether derogation might be prohibited, for instance, if it might disrupt the balance set up under a general treaty between the rights and obligations of the parties.

310. Finally, the Chairman observed that there was one aspect of the *lex specialis* issue that he had not dealt with in his report - namely the question of regional regimes and regionalism. He would produce a supplementary report on that issue for the Study Group in 2005. The Study Group welcomed this suggestion.

311. The Study Group endorsed the "systemic" perspective taken in the study and the conclusion that general international law functioned in an omnipresent manner behind special rules and regimes. Even as a special law did sometimes derogate from general law, cases such as the *Right of Passage* and *Gabcikovo-Nagymaros* demonstrated that the general law was not thereby set aside but continued to have an effect "in the background". Some members of the Study Group wondered, however, whether it might be possible to outline more clearly what this meant in practice. It was stated that the survey of case law threw welcome light on the role and functioning of the *lex specialis* maxim as a technique of legal reasoning in international law. The Study Group agreed, however, that there was no reason - indeed no possibility - to lay down strict or formal rules for the use of the maxim. Sometimes the maxim operated as an interpretative device, sometimes as a conflict-solution technique. How it was to be used depended on the situation, including the normative environment. It was pointed out that in addition to what had been stated in the study, a distinction existed between the use of the maxim in derogation of the law and in the *development* of the law and that the closeness of these two aspects highlighted its informal and context-dependent nature. The same was true of a related distinction, namely that between the permissibility of a derogation and the determination of the content of the rule that derogates. For example, even as derogation might be prohibited, *lex specialis* might still have applicability as a "development" of the relevant rule.

312. The discussion in the Study Group largely endorsed the conclusions of the study. Certain special aspects were, however, highlighted. It was stated that the time dimension - in other words, the relationship between the *lex specialis* and the *lex posterior* - had not been discussed extensively within the study. It was agreed, however, that how this should be dealt with was also dependent on the context, including by reference to the will of the parties.

313. Some members of the Study Group doubted the suggestion that the *lex specialis* maxim denoted an informal hierarchy. In their view, there was no hierarchy, formal or informal, between the sources of international law. If a treaty was normally given priority to a general custom this was not due to a hierarchy in law but merely to the need to give effect to the will of the parties - it was not inconceivable that a special custom might have priority over a general treaty for that same reason. In any case, there was reason to distinguish between priority between legal sources and priority between legal norms. There was also some criticism of the Chairman's treatment of the question of the ability to derogate from general law. Aside from the issue of *jus cogens*, the question of permissibility to derogate remained still an unclear matter.

(b) Self-contained (special) regimes

314. In introducing the part of his study concerning self-contained regimes (Addendum 1), the Chairman observed that the general thrust of his study was to accentuate the continued importance of general law. This was natural, he stated, as the rationale for the two was the same. Self-contained regimes were a subcategory of *lex specialis*.

315. The Chairman noted that there were three somewhat different senses in which the term "self-contained regimes" had been used. The starting point of his analysis was Article 55 of the Commission's Draft Articles on State Responsibility that gave two examples of this: the judgment of the Permanent Court of International Justice in the *Wimbledon* case (1923)[628] and the judgment of the ICJ in the *Hostages* (1980) case.[629] The cases referred, however, to somewhat different situations. The former (a broad sense) referred to a set of treaty points on a single issue (namely provisions of the Versailles Treaty on navigation on the Kiel Canal). The latter (a narrower sense) denoted a special set of secondary rules (namely rules of diplomatic law) claiming primacy to the general rules of State responsibility concerning consequences of a wrongful act. The broader sense denoted a special set of rules and principles on the administration of a determined problem, the narrower sense had to do with a special regime - a *lex specialis* - of State responsibility. He noted that some of the language used was problematic.

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[628] *Case of the SS "Wimbledon"*, *P.C.I.J. Ser. A*, No. 1 (1923) pp. 23-24.

[629] *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* "Hostages case", *I.C.J. Reports*, 1980, p. 41 (para. 86).

Especially the distinction the Commission made in its Commentary between "weaker" and "stronger" forms of *lex specialis*, and associating self-contained regimes with the latter was unfortunate. Self-contained regimes were neither stronger nor weaker than other forms of *lex specialis*.

316. In a third sense, which was raised in order to stimulate debate on the matter, the term self-contained (special) regimes was sometimes employed in academic commentary and practice to describe whole fields of functional specialization or teleological orientation in the sense that special rules and techniques of interpretation and administration were thought to apply (i.e. a special branch of international law with its own principles, institutions and teleology, such as "human rights law", "WTO law", humanitarian law, etc.). For example, the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* had recourse to such distinctions.[630] The three senses of "self-contained regime" were not however always clearly distinguishable from one another.

317. The notion of "self-contained regimes" had been constantly used by the Commission's Special Rapporteurs on the topic of State responsibility in a narrow and a broader sense, as outlined above. Although the Special Rapporteurs had held that States were entitled to set up self-contained regimes on State responsibility, there had never been any suggestion that such regimes would form "closed legal circuits". The question of residual application of the general rules in situations not expressly covered by the "self-contained regime" had not been treated by the Commission in any detail. However, the question of possible "fall-back" in case the regime would fail to operate as it was supposed to do had been discussed by Special Rapporteurs Riphagen and Arangio-Ruiz both of whom held it self-evident that in such cases, recourse to general law must be allowed. The main conclusion from the Commission's earlier debates was that neither the Commission nor the Special Rapporteurs - nor any of the cases regularly discussed in this connection - implied that the special rules would be fully isolated from general international law.

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[630] See e.g. *Legality of the threat or use of nuclear weapons*, Advisory opinion, *I.C.J. Reports*, 1996, paras. 24, 27, 34, 37, 51.

318. The Chairman suggested that in fact the term "self-contained regime" was a misnomer in the sense that no set of rules - whether in the narrower or the broader sense - was isolated from general law. He doubted whether such isolation was even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*.

319. The Chairman concluded that general law had a twofold role in respect of any special regime. First, it provided the normative background to and came in to fulfil aspects of the operation of a special regime that had not been provided for by the latter. For example, whether or not some entity was a "State" or exercised sovereignty over a territory were questions that would almost always need to be treated by reference to the general law. Second, the rules of general law also come to operate if the special regime failed to function properly. He therefore suggested that in further work on special regimes the main questions of interest concerned (a) the conditions for the establishment of a special regime; (b) the scope of application of the regime vis-à-vis general international law under normal circumstances; and (c) conditions a "fall-back" to general rules owing to the regime's failure.

320. Concerning the conditions for the establishment of special regimes, it was suggested that the rules on derogation in respect of *lex specialis* should also apply to special regimes. Thus, notwithstanding peremptory norms and certain other cases of non-derogation, contracting out was generally permissible.

321. Concerning the relationship of the special regime vis-à-vis general international law under normal circumstances, this was normally to be determined by an interpretation of the treaties that formed the regime. Drawing on examples offered by human rights regimes[631] and

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[631] See Int-Am CHR, *Velasquez & Rodriquez*, OC-4/88 (29 July 1988), Ser. C. No. 4. para. 184; *McElhinney v. Ireland* (31253/96) 21 November 2001, *ECHR* Reports 2001-XI (para. 36); *Al Adsani v. UK* (35763/97), 21 November 2001, Reports 2001-XI (para. 55). See also *Loizidou v. Turkey* (para. 43). *Fogarty v. the United Kingdom* (37112/97) 21 November 2001 *ECHR* 2001-XI (para. 36); *Bankovic v. Belgium and others* (52207/99), *123 I.L.R.* (2003), p. 108 (para. 57). See also Lucius Caflisch and Antonio Cancado Trindade, "Les conventions americaine et européenne des droits de l'homme et le droit international général", *108 RGDIP* (2004), pp. 11-22.

WTO law,[632] the Chairman observed that in none of the existing treaty-regimes was the application of general international law excluded. On the contrary, the treaty bodies made constant use of general international law. This was not, the Chairman pointed out, because of any specific act of "incorporation". As it had been stated by the ICJ in the *ELSI* case,[633] it was in the nature of important principles of general custom to apply in the absence of express clauses of derogation. There was no support in practice to the suggestion that general international law would apply to special regimes only as a result of incorporation. In fact, it was hard to see how regime-builders might agree *not* to incorporate (that is, opt out from) general principles of international law. Where would the binding nature of such an agreement emerge from?

322. Concerning the fall-back onto general rules taking place due to the failure of the special regime, it was pointed out that what counted as "failure" was far from clear. No general criteria could be set up to determine what counts as "regime failure" *in abstracto*. At least some of the avenues open to members of the special regime are outlined in the Vienna Convention on the Law of Treaties itself and also the rules on State responsibility might be relevant in such situations.

323. The Chairman stated that the main conclusion of his study was that the present use of the *lex specialis* maxim or the emergence of special treaty-regimes had not seriously undermined legal security, predictability or the equality of legal subjects. These techniques gave expression to concerns about economic development, protection of human rights and the environment, and regionalism that were both legitimate and strongly felt. The system was not in a crisis.

324. He also noted that no homogenous, hierarchical system was realistically available to do away with problems arising from conflicting rules or legal regimes. The demands of coherence and reasonable pluralism will continue to point in different directions. This might necessitate increasing attention to the way the Vienna Convention on the Law of Treaties might be used to

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[632] *United States - Standards of Reformulated and Conventional Gasoline* (WT/DS2/AB/R) 20 May 1996, DSR 1996: I p. 16; *Korea - Measures Affecting Government Procurement* (WT/DS163/R) 19 January 2000, para. 7.96; *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) 6 November 1998, paras. 127-131, DSR 1998: VII pp. 2794-2797.

[633] *Elettronica Sicula (ELSI) (Italy v. United States), I.C.J. Reports*, 1989, p. 42 (para. 50).

deal with collision of norms and regimes. It might, he suggested, also be useful to elucidate the notion of "general international law" and its operation in regard to particular rules and regimes.

325. In regard to future work on the latter item, the Chairman therefore proposed to focus on the operation of the special regimes in each of the three senses that special regimes were understood. A future study on this might set out: (i) the conditions of their establishment; (ii) their manner of autonomous operation; (iii) the role of general international law in regimes, including the solution of inter-regime conflicts; and (iv) the conditions and consequences of regime failure.

326. In the ensuing discussions, the Study Group took note of the terminological insecurity to which the Chairman had drawn attention. It agreed that the notion was constantly used in the narrower sense (i.e. special secondary rules of State responsibility) and a broader sense (i.e. special primary and secondary rules on a specific problem). The members observed that special regime, as understood in the third sense (i.e. whole fields of functional specialization), presented an intriguing phenomenon that ought to be studied further in order to fully understand the relationship it engenders to the general law and to the other two forms of special regime discussed in the report.

327. It was agreed that the notion of "self-containedness" did not intend to convey anything more than the idea of "speciality" of the regime. The Study Group also noted that the distinction between a "strong forms" and "weak form" of special regime ought to be abandoned. There was broad agreement that general law continued to operate in various ways even within special regimes. The relationship between the regime and the general law could not, however, be settled by any general rules.

328. Some members of the Study Group suggested that rather than interpreting the *ELSI* case as setting out a general principle that required derogation from the general law to be made expressly, it might be more in tune with reality to read it in terms of a presumption against derogation.

329. The Study Group emphasized that whether or not regime failure occurred ought to be interpreted by reference to the treaties constitutive of the regime itself. Here, again, it was impossible to provide any general rules. However, it might also be useful to study further the

different permutations in which such failure may occur. It was also suggested that it was up to the parties to the special regime to decide whether that regime had failed and what the consequences should be.

330. The Study Group noted the difficulties presented by the relationship between the general and the special were relative, with differences arising depending on the circumstances of each case. There was some scepticism about the effort to elucidate the notion "general international law". It was stressed that any such effort should focus on the operation of general law in regard to particular rules and regimes. In this connection it was emphasized that while the Vienna Convention on the Law of Treaties did constitute a general framework, its rules were residual in character and might often be superseded by agreement.

3. Discussion of outline concerning Study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties)

331. In its discussion of the topic, the Study Group proceeded on the basis of an outline and an oral presentation by Mr. Teodor Melescanu. The outline, considered, inter alia, the preparatory work leading to the adoption of article 30 of the Vienna Convention[634] and analysed the main provisions of that article,[635] including the basic principles relevant in its application, namely, the

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[634] For the work of Special Rapporteurs Hersch Lauterpacht, Gerald Fitzmaurice, and Humphrey Waldock, see *Yearbook … 1953*, vol. II, 1953, pp. 90 f., pp. 156-159, document A/CN.4/63; ibid., … 1954, vol. II, document A/CN.4/87 and Corr.1; ibid., … 1958, vol. II, document A/CN.4/115 and Corr.1; ibid., … 1963, vol. II, pp. 37 f, document A/CN.4/156 and Add.1-3.

[635] Article 30 of the Vienna Convention reads as follows:

"Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

principle of hierarchy in paragraph 1, the principle of the *lex prior* in paragraph 2, and the principle of the *lex posterior* in paragraphs 3 and 4 (a). The emergence of successive treaties on the same subject matter was a consequence of growth of international cooperation in response to novel needs arising in a changing environment.

332. In the main, article 30 is based on relevant concerns and did not create serious problems of fragmentation. Only paragraph (4) (b) of article 30 (i.e. governing the relations between a State that was party to two or more conflicting treaties and a State party to only one of them) did set off a situation of relevance for future consideration. Three points were noted. First, the mere conclusion of a subsequent inconsistent treaty would not per se give rise to a breach of international law. This would take place only through its *application*. Secondly, article 30 did not expressly address the question of the *validity* of the two inconsistent treaties, only of their relative *priority*.

333. Also, the provision did not address questions concerning suspension or termination nor address the legal consequence of violation of one treaty by the other. Thirdly, the provisions of article 30 were residual in character and in that sense not mandatory. Ultimately, it was left for

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3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

the will of States to establish priority among successive treaties in accordance with their interests. In this connection, it was suggested that one focus of the study could be to what extent the will of States could be curtailed - in particular the will of the State that was party to two inconsistent treaties to pick and choose which of the treaties it would fulfil and which it would choose to violate with the consequence of State responsibility for violation. Further study on this was to be based on State practice, case law and doctrine, including consideration of principles such as *pacta tertiis nec nocent nec prosunt* (a treaty cannot create rights or obligations for a third party without its consent, article 34 of the VCLT) and *prior tempore potior jure* (first in time, preferred in right).

334. In its discussion, the Study Group focused attention on the future orientation of the Study. It was acknowledged that most of article 30 did not pose dramatic problems of fragmentation. The only situation where an unresolved conflict of norms would ensue was that addressed by paragraph 4 (b).

335. In regard to paragraph 4 (b), the Study Group suggested that it may be useful to consider the treatment of the matter and the choices made by successive Special Rapporteurs on the Law of Treaties. The Study Group endorsed the focus to be given on whether limits could be imposed on the will of States to choose between the inconsistent treaties to which it was a party which it would comply with and which it would have to breach. It was wondered whether criteria arising from the distinction based on reciprocal, interdependent and absolute obligations such as discussed in relation to the inter se modification of treaties under article 41 could provide some guidelines in the implementation of article 30 as well.

336. In addition to paragraph 4 (b), two other instances of possible relevance were identified, namely (a) the case of successive bilateral treaties relating to the same subject matter; and (b) the case of a treaty, multilateral or bilateral, which differs from customary international law. In relation to fragmentation, the Study Group's view was that the former situation was normally quite unproblematic. With regard to the latter, it was suggested that although this situation might create problems, these were of a general nature and did not need to be dealt with in this connection.

337. The Study Group agreed that the provisions of article 30 had a residual character. Some members wondered, however, whether it was correct to say that they were not mandatory. The provisions reflected largely accepted and reasonable considerations. The Group also agreed that conflicts would generally arise only at the time of the application of the subsequent treaty, but it was also suggested that at least in some cases a conflict might also emerge already at the moment of conclusion of the later treaty.

4. Discussion of outline concerning Study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties)

338. The Study Group proceeded on the basis of an outline and an oral presentation by Mr. Riad Daoudi. The outline, inter alia, considered the context in which an inter se agreement under article 41 of the Vienna Convention[636] applied, giving rise to two types of legal relations: "general relations" applicable to all parties to a multilateral treaty and "special" relations

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[636] Article 41 of the Vienna Convention reads as follows:

"Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

    (a) the possibility of such a modification is provided for by the treaty; or

    (b) the modification in question is not prohibited by the treaty and:

        (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

        (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

applicable to two or more parties to the inter se agreement. The inter se agreement thus *modifies* the operation of the original treaty without *amending* it. The relationship between the general and the particular is analogous to the relationship between the *lex generalis* and the *lex specialis*.

339. It was the principal concern of article 41 to allow inter se agreements but to make sure they preserved the coherence of the original treaty. The conditions for concluding inter se agreements include (a) the preservation of the rights and interests of the parties to the original multilateral treaty,[637] (b) the non-imposition of additional obligations or burdens on parties to the multilateral agreement and (c) the preservation of the object and purpose of the multilateral treaty. In addition, there were conditions concerning the notification of the inter se agreement to their other parties and their reaction to it.

340. Concerning incompatibility with the object and purpose of the treaty (art. 41 (1) (b) (ii)), the situation with respect to an inter se agreement appeared to be no different from rules applicable in respect of reservations. It was suggested that an objective criterion would be useful to determine the permissibility of an inter se agreement. A modification was unproblematic in case of treaties laying down reciprocal obligations, that is, when the treaty consisted essentially of a network of bilateral relations.[638] The power of modification was limited in regard to treaties containing interdependent[639] and absolute[640] obligations.

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[637] See for example article 311 (3) of the United Nations Convention on the Law of the Sea.

[638] For example, the Vienna Convention on Diplomatic Relations 1961, and the Vienna Convention on Consular Relations 1963.

[639] A disarmament treaty is an interdependent treaty inasmuch as the performance by one party of its obligations is a prerequisite for the performance by the other parties of theirs. A breach by one party is in effect a breach vis-à-vis all the other parties.

[640] A human rights treaty gives rise to absolute obligations: The obligations it imposes are independent and absolute and performance of them is independent of the performance by the other parties of their obligations.

341. The outline also discussed the question of sanctions for breach of the multilateral treaty by the parties to an inter se agreement. The text of article 41 left open two questions, namely, the legal effect of a violation of paragraph 1 constituting a material breach and the legal effect of an objection made after notification had been given under article 41 (2). Article 60 of the Vienna Convention sets out the conditions of reaction to material breach by the parties without defining what constituted "material breach". The law of State responsibility would cover the case of violation of the original treaty by the inter se agreement.

342. The Study Group noted that article 41 reflected the understandable need for parties to allow the development of the implementation of a treaty by inter se agreement. The relationship between the original treaty and the inter se agreement could sometimes be conceived as those between a minimum standard and a further development thereof. It did not, then, normally pose difficulties by way of fragmentation. The conditions of permissibility of inter se agreements reflected general principles of treaty law that sought to safeguard the integrity of the treaty. However, it was also pointed out that the conditions of inter se agreements were not always connected to the nature of the original agreement but also to the nature of a *provision* thereof (article 41 (1) (b) (ii)). The consequences of impermissible inter se agreements were not expressly dealt with in article 41 and should be further analysed.

343. Attention was drawn to the semantic differences between *modification, amendment* and *revision* in the application of article 41. Although expressions were technically different, those differences were not always clear-cut. A modification, for instance, might sometimes be understood as a proposal for amendment. It was suggested that some attention should be given to this in the further study. It was likewise suggested that it might be useful to review the relationship between the different principles of coherence, including the relations between article 30 (subsequent agreements), 41 (inter se modification) and Article 103 of the United Nations Charter (priority of the Charter obligations).

344. It was also considered useful to explore further the role that "notification" of the inter se agreements can in practice play in reducing incidences of fragmentation. If possible, a review of the practice of notifying other States and of other States reacting to such notifications.

5. Discussion on outline concerning the interpretation of treaties in the light of "any relevant rules of international law applicable in relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community

345. The Study Group proceeded on the basis of an outline and oral presentation by Mr. William Mansfield. The outline addressed inter alia the function of article 31 (3) (c),[641] in particular its textual construction, noting that it refers to *rules* of international law; that it is not restricted to customary international law; that it refers to rules that are both *relevant* and *applicable*; and that it is not restricted by temporality. It also analysed article 31 (3) (c) against a background reference to its consideration by the Commission[642] and its use in several cases before the Iran-United States Claims Tribunal,[643] the European Court of Human Rights[644] and

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[641] Article 31 (3) (c) of the Vienna Convention reads as follows:

"Article 31

General rule of interpretation

...

3. There shall be taken into account, together with the context:

...

(c) any relevant rules of international law applicable in the relations between the parties.

..."

[642] *Yearbook … 1964*, vol. II, p. 5 at 52-65, document A/CN.4/167 and Add.1-3. See also document A/5809.

[643] *Esphahanian v. Bank Tejarat*, 2 Iran-USCTR (1983) 157. See also *Case No. A/18* (1984) 5 Iran-USCTR 251, 260. The provision was also relied upon on a dissent in *Grimm v. Iran* 2 Iran-USCTR 78, 82 on the question of whether a failure by Iran to protect an individual could constitute a measure "affecting property rights" of his wife.

[644] *Golder v. United Kingdom*, Judgment 21 February 1975, *ECHR* Ser. A [1995] No. 18. See also *Fogarty v. United Kingdom* Application No. 37112/97 *123 I.L.R.* (2001) 54; *McElhinney v. Ireland* Application No. 31253/96 *123 I.L.R.* (2001) 73; *Al-Adsani v. United Kingdom* Application No. 35763/97 *123 I.L.R.* (2001) 24.

the International Court of Justice.[645] It further considered three concrete examples of its application in the *Mox Plant* Litigation before the International Tribunal for the Law of the Sea, the OSPAR Arbitral Tribunal; and the UNCLOS Arbitral Tribunal;[646] in *Pope and Talbot Inc. v. Canada* before the NAFTA Tribunal;[647] in the *Shrimp-Turtle*[648] and *Beef Hormones*[649] cases in the context of the WTO dispute settlement procedures.

346. The outline reached some preliminary conclusions concerning issues which the formulation of article 31 (3) (c) did not resolve and offered suggestions for future work. The outline pointed to the inherent limits of the technique of treaty interpretation as a means of reducing the incidence of fragmentation in relation to article 31 (3) (c). It was noted that such limits arise from (a) the different context in which other rules of international law may have been developed and applied; and (b) the progressive purpose of many treaties in the development of international law.

347. As a general rule, there would be no room to refer to other rules of international law unless the treaty itself gave rise to a problem in its interpretation. A need for the use of article 31 (3) (c) specifically would arise normally if (a) the treaty rule is unclear and the ambiguity appears to be resolved by reference to a developed body of international law; (b) the

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[645] Case concerning Oil Platforms (*Islamic Republic of Iran v. United States*), see *www.icj-cij.org*. See also *42 ILM* (2003) 1334. See also separate opinion of Judge Weeramentry in Case Concerning the Gabčikovo-Nagymaros Project (*Hungary v. Slovakia*) *I.C.J. Reports*, 1997, p. 7 at 114.

[646] International Tribunal for the Law of the Sea: the *Mox Plant* case (*Ireland v. United Kingdom*) - *Request for Provisional Measures Order* (3 December 2001) *www.itlos.org;* Permanent Court of Arbitration: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention: Ireland v. United Kingdom - Final Award* (2 July 2003) *42 ILM* (2003) 1118; Permanent Court of Arbitration: the *Mox Plant* case: *(Ireland v. United Kingdom) - Order No 3* (24 June 2003) *42 ILM* (2003) 1187.

[647] Award on the merits, 10 April 2001; award in respect of damages, 31 May 2002, *41 ILM* (2002) 1347.

[648] WTO *United States: Import Prohibition of certain Shrimp and Shrimp Products - Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R. See also *38 ILM* (1999) 118.

[649] WTO *EC measures concerning meat and meat products (hormones - Report of the Appellate Body* (16 January 1998) WT/DS-26/AB/R.

terms used in the treaty have a well-recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer; or (c) the terms of the treaty are by their nature open-textured and reference to other sources of international law will assist in giving content to the rule.[650]

348. Secondly, inter-temporality was discussed as it related to the determination of the point in time at which other rules of international law ought to apply and the relevance of evolving standards. Thirdly, the outline singled out certain problems in the application of article 31 (3) (c) that had not been resolved by the formulation of its reference to other treaties applicable in relations between the parties. In particular, the question was raised whether it was necessary that all the parties to the treaty being interpreted should be parties to the other treaty to which reference was being made or whether it was sufficient that only some of them were.

349. The Study Group emphasized that article 31 (3) (c) became applicable only when there was a problem of interpretation. In such case, the provision pointed to certain rules that should be "taken into account" in carrying out the interpretation. It did not, however, indicate any particular way in which this should take place. In particular, there was no implication that those other rules should determine the interpretation. The various rules would have to be weighed against each other in a manner that was appropriate in the circumstances. It was observed that the fact that article 31 (3) (c) was rarely expressly cited should not obscure its importance as a rule of treaty interpretation. It was quite essential for promoting harmonization and guaranteeing the unity of the international legal system. Therefore it deserved a careful study.

350. The Study Group discussed at length the question of what rules were covered by the reference in article 31 (3) (c). While it was clear that provision referred to other *treaty* rules that were relevant and applicable, it did not exclude the application of other sources of international law, such as customary law and general principles recognized by civilized nations. In the future study, attention might be given to how customary law and other relevant rules were to be applied. Again, though the reference was to be understood as wide, it was useful to bear in mind that the interpretation would need to come about as a process of weighing all the relevant rules.

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[650] This was the position in the construction of article XX of the GATT discussed in *Shrimp-Turtle* and *Beef Hormones* cases.

351. The Study Group also discussed the relationship of article 31 (3) (c) to other rules of treaty interpretation - for instance those referring to good faith and the object and purpose of the treaty - and suggested that attention might be given to its relationship in general with article 32. It was likewise stressed that the existence of "mobile" concepts and the emergence of standards generally accepted by the international community, should be taken into account. It was wondered whether the way inter-temporal law was seen at the time of adoption of the Vienna Convention in 1969 continued to remain valid in view of the many transformations in the international system since.

6. Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules

352. In its discussion on this topic, the Study Group proceeded on the basis of an outline and oral presentation by Mr. Zdzislaw Galicki. The outline addressed the nature of the topic in relation to fragmentation of international law, beginning with a brief description of *jus cogens*,[651] obligations *erga omnes*[652] and the nature of obligations concerning Article 103 of the Charter as well as their acceptance and rationale, noting that contemporary international law accords such norms and obligations priority over other norms. It was suggested that future work would analyse these categories of norms and obligations. The intention was not, then, to establish any hierarchy of legal sources.

353. Secondly, the outline offered a brief perspective on the concept of hierarchy in international law. It was recalled that there was agreement in the Study Group that it may not always be appropriate to draw hierarchical analogies from the domestic legal system. There was no well-developed and authoritative hierarchy of values in international law and thus no stable

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[651] See art. 53 of the Vienna Convention on the Law of Treaties of 1969. See also art. 41 and 48 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

[652] See *Case concerning the Barcelona Traction, Light and Power Company, Ltd. (Second phase) I.C.J. Reports*, 1970, p. 3 at 32. See also *Advisory opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide I.C.J. Reports*, 1951, p. 15 at 23; *Case concerning East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports*, 1995, p. 90 at 102; *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports*, 1996, p. 595 at 616.

hierarchy of techniques by which to resolve conflicts, either.[653] Accordingly, hierarchy reflected a process of the law's development. Sometimes such hierarchies would contribute to the law's fragmentation, sometimes to its unification. It was suggested that future work would describe aspects of that evolution with a focus to the emergence of normative hierarchies.

354. Thirdly, the outline alluded to the need to address *jus cogens, erga omnes* and Article 103 of the Charter *as conflict rules.* This would mean focusing on (a) their priority towards other norms of international law in general; (b) their hierarchical relationship with each other; and (c) the hierarchical relationships within these categories (e.g. conflicting *jus cogens* norms).

355. The Study Group concentrated on the future orientation of the Study. It was emphasized that the study should be practice-oriented and refrain from identifying general or absolute hierarchies. Hierarchy should be treated as an aspect of legal reasoning within which it was common to use such techniques to set aside less important norms by reference to more important ones. This was what it meant to deal with such techniques as *conflict rules.* It was advisable not to overstretch the discussion on hierarchy but to limit it to its function in resolving conflicts of norms. On the other hand, it might be useful to illustrate the manner in which the evolutionary nature of these hierarchical concepts appeared in practice.

356. The Study Group recognized that an overly theoretical discussion on this topic would raise issues which are complex and controversial. Focus should be on giving examples of the use of hierarchical relationships in practice and doctrine in order to solve normative conflicts. Those cases might then enable an articulation of typical situations where hierarchical relationships have been established.

357. It was also held useful to analyse the differences between *jus cogens* and *erga omnes* obligations. Some members wondered whether obligations *erga omnes* implicated hierarchical relationships in the manner that *jus cogens* did. Likewise, it was felt that attention should be given to the consequences of the use of a hierarchical relationship: what would happen to the inferior rule set aside by the superior one? Might State responsibility be implicated?

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[653] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 506.

358. While hierarchy might sometimes bring about fragmentation, the Study Group emphasized that in most situations it was used to ensure the unity of the international legal system. The Group supported the suggested focus on the possible conflicts between the three hierarchical techniques as well as on the eventual conflicts within each category. Support was also expressed for the consideration of the relationship between the present study and the interpretative techniques explored in the other studies.

CHAPTER XI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

359. At its 2818th meeting, held on 16 July 2004, the Commission established a Planning Group for the current session.

360. The Planning Group held three meetings. It had before it Section H of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session entitled "Other decisions and conclusions of the Commission" and General Assembly resolution 58/77 on the Report of the International Law Commission on the work of its fifty-fifth session.

361. At its 2823rd meeting, held on 27 July 2004, the Commission took note of the report of the Planning Group.

1. Working Group on long-term programme of work

362. The Working Group on the Long-term programme of work was reconstituted with Mr. Pellet as Chairman of this Working Group. The Working Group held five meetings and its Chairman reported orally to the Planning Group on 20 July 2004. The Working Group intends to submit a full report together with the topics that it proposes for inclusion on the long-term programme of work at the end of the quinquennium. However, the Working Group recommended that the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" be included in the Commission's long-term programme of work. It considered that the topic met the relevant criteria which were mentioned in the Commission's 2000 report, namely that this topic is precise and presents a theoretical and practical utility in terms of codification and progressive development of international law.

363. The Commission agreed with the recommendation of the Planning Group that this topic be included in the long-term programme of work. The preliminary outline presenting the topic is annexed to the present report. The Commission envisages the inclusion of this topic in its current programme of work at its next session.

2. New topics for inclusion in the current programme of the work of the Commission

364. The Commission considered the selection of new topics for inclusion in the Commission's current programme of work and decided to include two new topics, namely "Expulsion of aliens" and "Effects of armed conflicts on treaties". In this regard, the Commission decided to appoint Mr. Maurice Kamto, Special Rapporteur for the topic "Expulsion of aliens" and Mr. Ian Brownlie, Special Rapporteur for the topic "Effects of armed conflicts on treaties".

3. Strategic Framework

365. The Commission, having considered part of the Strategic Framework (2006-2007) for Programme 6: Sub-programme 3 (Progressive development and codification of international law), prepared pursuant to General Assembly resolution 58/269, takes note with approval of this part of the Strategic Framework.

4. Documentation of the Commission

366. The Commission noted with satisfaction that the General Assembly in paragraph 16 of its resolution 58/77 approved the Commission's conclusion on its documentation.

367. With regard to section II.B, paragraph 9 of General Assembly resolution 58/250 "Pattern of Conferences" concerning summary records of bodies entitled to them, the Commission, having considered several possibilities proposed by the Secretariat, concluded that none of them would meet the needs of the Commission. The Commission recalled that on several occasions it considered the summary records as an inescapable requirement for the procedures and methods of its work. They constitute the equivalent of *travaux préparatoires* and are an indispensable part of the process of progressive development of international law and its codification. They are vital for the Commission's work. Moreover, the Commission stressed the importance of summary records as an essential part of the ILC Yearbook.

368. The Commission noted with appreciation the updated Survey of Liability Regimes prepared by the Codification Division and the Comments and observations received from Governments and international organizations on the topic Responsibility of International Organizations and recommends that they be issued as official documents of the Commission.

5. Honoraria

369. The Commission reiterated once more the views it had expressed in paragraphs 525 to 531 of its Report on the work of its fifty-fourth session (A/57/10) and in paragraph 447 of its Report on the work of its fifty-fifth session (A/58/10). The Commission reiterates that General Assembly resolution 56/272 of 27 March 2002 concerning the question of honoraria especially affects Special Rapporteurs, in particular those from developing countries, as it compromises the support for their necessary research work.

B. Date and place of the fifty-seventh session of the Commission

370. The Commission decided to hold a 10-week split session which will be held at the United Nations Office at Geneva from 2 May to 3 June and 4 July to 5 August 2005.

C. Cooperation with other bodies

371. At its 2813th meeting, held on 7 July 2004, Judge Jiuyong Shi, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it. His statement is recorded in the summary record of that meeting. An exchange of views followed.

372. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law were represented at the present session of the Commission by Mr. Guy de Vel, who addressed the Commission at its 2799th meeting, held on 14 May 2004.[654] An exchange of views followed.

373. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Z. Kamil, who addressed the Commission at its 2816th meeting, held on 13 July 2004.[655] An exchange of views followed.

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[654] This statement is recorded in the summary record of that meeting.

[655] Ibid.

374. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Felipe Paolillo, who addressed the Commission at its 2819th meeting, held on 20 July 2004.[656] An exchange of views followed.

375. Members of the Commission held an informal exchange of views on issues of mutual interest, and in particular on the topic "Reservations to treaties" with members of the Committee on the Rights of the Child on 19 May 2004 and with members of the Committee on the Elimination of Racial Discrimination on 4 August 2004. At the invitation of the Sub-Commission on the Promotion and Protection of Human Rights, members of the Commission attended a meeting of the Sub-Commission, on 5 August 2005, at which the question of reservations to human rights treaties was discussed and an exchange of views followed.

376. On 1 June 2004, an informal exchange of views was held between members of the Commission and members of the legal services of the International Committee of the Red Cross on topics of mutual interest. On 28 July 2004, an informal exchange of views was held between members of the Commission and members of the International Law Association on topics of mutual interest for the two institutions, in particular programmes of work, responsibility of international organizations and water resources.

D. Representation at the fifty-ninth session of the General Assembly

377. The Commission decided that it should be represented at the fifty-ninth session of the General Assembly by its Chairman, Mr. Teodor Viorel Melescanu.

378. Moreover, at its 2830th meeting held on 6 August 2004, the Commission requested Mr. C.J.R. Dugard, Special Rapporteur on the topic "Diplomatic Protection", and Mr. P.S. Rao, Special Rapporteur on the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities)", to attend the fifty-ninth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.

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[656] Ibid.

E. International Law Seminar

379. Pursuant to General Assembly resolution 58/77, the fortieth session of the International Law Seminar was held at the Palais des Nations from 5 to 23 July 2004, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

380. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[657] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

381. The Seminar was opened by the Chairman of the Commission, Mr. Teodor Melescanu. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar.

382. The following lectures were given by members of the Commission: Mr. Joao Clemente Baena Soares: "*The Work of the High Level Commission on UN Reform*"; Mr. John Dugard: "*Diplomatic Protection*"; Mr. Martti Koskenniemi: "*Fragmentation of International Law*";

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[657] The following persons participated in the fortieth session of the International Law Seminar: Mr. Ghulam Shabbir Akbar (Pakistan); Mr. Abdul Rahman Al Baloushi (United Arab Emirates); Mr. Steven James Barela (United States of America); Mr. Martin Bartoň (Slovak Republic); Mr. Philip Bittner (Austria); Mr. Srinivas Burra (India); Mr. Jean d'Aspremont Lynden (Belgium); Ms. Sandra Deheza Rodriguez (Bolivia); Ms. Rosa Delia Gomez-Duran (Argentina); Ms. Mateja Grašek (Slovenia); Ms. Hisaan Hussain (Maldives); Mr. Mbelwa Kairuki (Tanzania); Mr. Sifana Ibsén Kone (Burkina Faso); Ms. Annemarieke Künzli (Netherlands); Ms. Eneida Lima (Cape Verde); Mr. Maxim Musikhin (Russia); Ms. Jeannette Mwangi (Kenya); Ms. Katya Pineda (El Salvador); Mr. Resfel Pino Alavarez (Cuba); Mr. Pablo Sandonato de Léon (Uruguay); Mr. Abdoulaye Tounkara (Mali); Mr. Ian Wadley (Australia); Mr. Yehenew Walilegne (Ethiopia); Mr. Chen Wang (China). A Selection Committee, under the Chairmanship of Mr. Jean-Marie Dufour (President of the Geneva International Academic Network, GIAN), met on 21 April 2004 and selected 24 candidates out of 77 applications for participation in the Seminar.

Mr. Giorgio Gaja: "*Responsibility of International Organizations*"; Mr. Chusei Yamada: "*Shared Natural Resources*"; Mr. Michael Matheson/Mr. Djamchid Momtaz: "*The I.C.J. decision on oil platform (6 November 2003)*"; Mr. P.S. Rao: "*International Liability*".

383. Lectures were also given by Mr. Ralph Zacklin, Assistant Secretary-General, Acting Legal Counsel: "*International Tribunals established by the United Nations: lessons learned*", Ms. Maria Isabel Torres Cazorla, Professor, University of Malaga: "*Unilaterai Acts*", Ms. Pereyra-Frederichsen, Legal Affairs Officer, WTO: "*WTO Dispute Settlement System*", Ms. Jelena Pejic, Legal Adviser, ICRC: "*Current Challenges to International Humanitarian Law*", Mr. George Korontzis, Senior Legal Officer, United Nations Office of Legal Affairs: "*The ILC History: working methods, Programme of Work*", and Mr. Markus Schmidt, Senior Legal Officer, OHCHR: "*The Human Rights Committee and the Individual Complaints Procedures*".

384. Each Seminar participant was assigned to one of two working groups on "Unilateral Acts" and "Aquifers". The Special Rapporteurs of the Commission for these subjects, Mr. Victor Rodriguez Cedeño and Mr. Chusei Yamada ("Shared Natural Resources"), provided guidance for the working groups. The groups presented their findings to the Seminar. Each participant was also assigned to submit a written summary report on one of the lectures. A collection of the reports was compiled and distributed to all participants.

385. Participants were also given the opportunity to make use of the facilities of the United Nations Library, which extended its opening hours during the event.

386. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms followed by a reception.

387. Mr. Teodor Melescanu, Chairman of the Commission, Mr. Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva, Mr. Ulrich von Blumenthal, Director of the Seminar, and Mr. Srinivas Burra, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the fortieth session of the Seminar.

388. The Commission noted with particular appreciation that the Governments of Austria, Finland, Germany, Ireland, Norway and Sweden had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed the awarding of a sufficient number of fellowships to deserving candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 17 candidates and partial fellowships (subsistence only) to 2 candidates.

389. Of the 903 participants, representing 156 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 541 have received a fellowship.

390. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2005 with as broad participation as possible.

391. The Commission noted with satisfaction that in 2004 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, within existing resources.

ANNEX

The Obligation to Extradite or Prosecute (*"aut dedere aut judicare"*) in International Law

Preliminary remarks

(Zdzislaw Galicki)

I. General introduction to the topic

1. The formula "extradite or prosecute" (in Latin: *"aut dedere aut judicare"*) is commonly used to designate the alternative obligation concerning the treatment of an alleged offender, "... which is contained in a number of multilateral treaties aimed at securing international cooperation in the suppression of certain kinds of criminal conduct".[1]

2. As it is stressed in the doctrine, "the expression '*aut dedere aut judicare*' is a modern adaptation of a phrase used by Grotius: '*aut dedere aut punire*' (either extradite or punish)".[2] It seems, however, that for applying it now, a more permissive formula of the alternative obligation to extradition ("prosecute" [*judicare*] instead of "punish" [*punire*]) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured.

3. A modern approach does not seem to go so far, taking also into account that an alleged offender may be found not guilty. Furthermore, it leaves without any prejudice a question if the discussed obligation is deriving exclusively from relevant treaties or if it also reflects a general obligation under customary international law, at least with respect to specific international offences.

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[1] M. Cherif Bassiouni and E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*; M. Nijhoff Pub., Dortrecht/Boston/London 1995, p. 3.

[2] Ibid., p. 4. See also, Hugo Grotius, *De Iure Belli ac Pacis*, Book II, chap. XXI, paras. III and IV; English transl., *The Law of War and Peace* (Classics of International Law, F.W. Kelsey transl.) 1925, pp. 526-529.

4. It was underlined by the doctrine that to determine the effectiveness of the system based on the obligation to extradite or prosecute three problems have to be addressed: "first, the status and scope of application of this principle under international law; second, the hierarchy among the options embodied in this rule, provided that the requested State has a choice; third, practical difficulties in exercising *judicare*".[3] It also seems necessary to find out if there is any hierarchy of particular obligations which may derive from the obligation to extradite or prosecute (henceforth "the obligation"), or is it just a matter of discretion of States concerned.

5. A preliminary task in future codification work on the topic in question would be to complete a comparative list of relevant treaties and formulas used by them to reflect this obligation. Some attempts have already been done by the doctrine, listing a large number of such treaties and conventions.[4] These are both substantive treaties, defining particular offences and requiring their criminalization and the prosecution or extradition of offenders, as well as procedural conventions, dealing with extradition and other matters of legal cooperation between States.

6. In particular, the obligation to extradite or prosecute during the last decades has been included into all, so-called sectoral conventions against terrorism, starting with the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in the Hague on 16 December 1970,[5] which in Article 7 stated:

> "The Contracting State in the territory of which the alleged offender is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."

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[3] M. Plachta, "Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches"; in: *Maastricht Journal of European and Comparative Law, 1999*, vol. 6, No. 4, p. 332.

[4] M. Cherif Bassiouni and E.M. Wise, op. cit., pp. 75-302; also: *Oppenheim's International Law* (9 ed., R.Y. Jennings and A. Watts eds. 1992), vol. I, pp. 953-954.

[5] United Nations *Treaty Series*, vol. 860, No. 12325.

7. As it was noticed by the doctrine, two variants of the Hague Convention formula can be identified:

> **"(a) the alternative obligation to submit a case for prosecution is subject, where a foreigner is involved, to whether a State has elected to authorize the exercise of extraterritorial jurisdiction;**
>
> **(b) the obligation to submit a case for prosecution only arises when a request for extradition has been refused."[6]**

8. By way of example, the following conventions can be mentioned:

> **(i) as it concerns (a) - United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 - article 6, paragraph 9;**
>
> **(ii) as it concerns (b) - the European Convention on the Suppression of Terrorism of 1977 - article 7.**

9. Through such a formulation, as contained in the 1970 Hague Convention, the obligation in question has been significantly strengthened by combining it with the principle of universality of suppression of appropriate terrorist acts. The principle of universality of suppression should not be identified, however, with the principle of universality of jurisdiction or universality of competence of judicial organs. The universality of suppression in this context means that, as a result of application of the obligation to extradite or prosecute between States concerned, there is no place where an offender could avoid criminal responsibility and could find so-called "safe haven".

10. On the other hand, a concept of the principle of universal jurisdiction and competence, especially in recent years, is often connected with the establishment of international criminal

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[6] M. Plachta, op. cit., p. 360.

courts and their activities. In practice, however, the extent of such "universal jurisdiction and competence" depends on the number of States accepting the establishment of such courts and is not directly connected with the obligation to extradite or prosecute.

11. It seems inevitable, when analysing various aspects of applicability of the obligation, to trace an evolution of the principle of universality from its initial form, contained in the quoted above Article 7 of the 1970 Hague Convention, up to the provisions of the Rome Statute of 17 July 1998 of the International Criminal Court.

12. In the realm of already performed codification, the obligation may be found in Article 9, entitled "Obligation to extradite or prosecute", contained in the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at its forty-eighth session in 1996.[7] It says as follows:

> "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20[8] is found shall extradite or prosecute that individual."

13. Although the International Law Commission in the quoted provision has recognized the existence of the obligation in question, it has done it, however, exclusively in relation to a strictly limited and defined group of offences, described generally as crimes against the peace and security of mankind (with exclusion of "Crime of aggression"). In any case, this recognition may be considered as a beginning point for further considerations to what extent this obligation may be extended on other kinds of offences. Furthermore, it is worth noticing that the Commission has introduced a concept of "triple alternative", considering a possibility of parallel jurisdictional competence to be exercised not only by interested States, but also by international criminal courts.

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[7] See: *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10).

[8] These are such crimes as "Crime of genocide", "Crimes against humanity", "Crimes against the United Nations and associated personnel" and "War crimes".

14. One of the earliest examples of such "third choice" may be found in the Convention for the Creation of an International Criminal Court, opened for signature at Geneva, on 16 November 1937. The said Court was intended to be established for the trial of persons accused of an offence dealt with in the Convention for the Prevention and Punishment of Terrorism from the same date.[9] In accordance with the provisions of Article 2 of the first Convention, the persons accused could be prosecuted either by a State before its own courts, or extradited to the State entitled to demand extradition, or committed for trial to the International Criminal Court. Unfortunately, the said Convention has never entered into force and the Court in question could not be established.

15. Alternative competences of the International Criminal Court, established on the basis of the Rome Statute of 1998, are generally known. The Statute gives a choice between exercising jurisdiction over an offender by the State itself or having him surrendered to the jurisdiction of the International Criminal Court.

16. It seems that the existing treaty practice, significantly enriched in recent decades, especially through various conventions against terrorism and other crimes threatening international community, has already created a sufficient basis for considering the extent to which the obligation to extradite or prosecute, so important as a matter of international criminal policy, has become a matter of definite legal obligation.

17. In addition, there is already a judicial practice, which has been dealing with the said obligation and has confirmed its existence in contemporary international law. The Lockerbie Case before the International Court of Justice has brought a lot of interesting materials in this field, especially through dissenting opinions of five judges to the decisions of the Court of 14 April 1992 "not to exercise its power to indicate provisional measures" as requested by Libya.[10] Although the Court itself was rather silent as it concerns the obligation in question, the

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[9] For the texts of both conventions, see: *International Legislation. A collection of the texts of multiple international instruments of general interest* (ed. by M.O. Hudson), vol. VIII, 1935-1937, No. 402-505, Washington 1941, pp. 862-893.

[10] Two identical decisions were adopted, concerning "Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom* and *Libyan Arab Jamahiriya v. United States of America*), Provisional Measures", Orders of 14 April 1992, *I.C.J. Reports*, 1992, p. 3 and p. 114.

dissenting judges have confirmed in their opinions the existence of "the principle of customary international law *aut dedere aut judicare*"[11] and of "a right recognized in international law and even considered by some jurists as *jus cogens*".[12] These opinions, though not confirmed by the Court, should be taken into account when considering the trends of contemporary development of the said obligation.

18. It seems to be obvious that the main stream of considerations concerning the obligation to extradite or prosecute goes through the norms and practice of international law. It cannot be forgotten, however, that "… efforts towards optimalization of the regulatory mechanism rooted in the principle *aut dedere aut judicare* may be undertaken either on the international level or on the domestic level".[13] Internal criminal, and even constitutional regulations should be taken here into consideration on equal level with international legal norms and practices.

19. As it has been correctly noticed in the doctrine, "… the principle *aut dedere aut judicare* cannot be perceived as a panacea whose universal application will cure all the weaknesses and ailments that extradition has been suffering from for such a long time. (…) In order to establish *aut dedere aut judicare* as a universal rule of extradition, the efforts should be made to gain the acceptance of the proposition that first, such a rule has become an indispensable element of the suppression of criminality and bringing offenders to justice in an international arena, and second, that it is untenable to continue limiting its scope to international crimes (and not even all of them) as defined in international conventions."[14] It seems that this guideline could be followed in future codification work to be undertaken by the International Law Commission.

20. In the light of what has been said above it seems that the topic of "The Obligation to Extradite or Prosecute *(aut dedere aut judicare)* in International Law" has achieved a sufficient

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[11] Ibid., pp. 51, 161 (Judge Weeramantry - dissenting).

[12] Ibid., pp. 82, 187 (Judge Ajibola - dissenting).

[13] M. Plachta, op. cit., p. 332.

[14] Ibid., p. 364.

substantial maturity for its codification, with a possibility of including some elements of progressive development. At this stage it seems, however, premature to decide if a final product of the Commission's work should take the form of draft articles, guidelines or recommendations. If the topic is going to be accepted, the main points to be considered at the beginning by the Commission could be as follows:

II. Preliminary plan of action

21. Comparative analysis of appropriate provisions concerning the obligation, contained in the relevant conventions and other international instruments - systematic identification of existing similarities and differences.

22. Evolution and development of the obligation - from "Grotius formula" to "triple alternative":

(a) extradite or punish;

(b) extradite or prosecute;

(c) extradite or prosecute or surrender to international court.

23. Actual position of the obligation in contemporary international law:

(a) as deriving from international treaties;

(b) as rooted in customary norms - consequences of customary status;

(c) possibility of mixed nature.

24. The extent of substantial application of the obligation:

(a) to "all offences by which another State is particularly injured" (Grotius);

(b) to a limited category or categories of offences (e.g. to the "crimes against the peace and security of mankind", or to "international offences", etc.) - possible criteria of qualifying such offences.

25. The content of the obligation:

(a) Obligations for States (*dedere* or *judicare*):

(i) extradition: conditions and exceptions,

(ii) jurisdiction: grounds for establishing;

(b) rights for States (in case of application or non-application of the obligation).

26. Relation between the obligation and other rules concerning jurisdictional competences of States in criminal matters:

(a) "offence-oriented" approach (e.g. article 9 of the Draft Code of Crimes against the Peace and Security of Mankind, article 7 of the 1970 Hague Convention);

(b) "offender-oriented" approach (e.g. article 6, paragraph 2 of the 1957 European Convention on Extradition);

(c) principle of universality of jurisdictional competences:

(i) as exercised by States,

(ii) as exercised by international judicial organs.

27. Nature of particular obligations deriving under international law from the application of the obligation:

(a) equality of alternative obligations (extradite or prosecute), or a prevailing position of one of them (hierarchy of obligations);

(b) possible limitations or exclusions in fulfilling alternative obligations, (e.g. non-extradition of own nationals, political offences exception, limitations deriving from human rights protection, etc.);

(c) possible impact of such limitations or exclusions on another kind of obligations (e.g. impact of extradition exceptions on alternatively exercised prosecution);

(d) the obligation as a rule of substantive or procedural character, or of a mixed one;

(e) position of the obligation in the hierarchy of norms of international law:

- **(i) secondary rule,**
- **(ii) primary rule,**
- **(iii) jus cogens norm (?).**

28. Relation between the obligation and other principles of international law (e.g. principle of sovereignty of States, principle of human rights protection, principle of universal suppression of certain crimes, etc.).

III. Compatibility with the conditions of the selection of new topics

29. The topic "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) in International Law", proposed for the consideration by the International Law Commission, fulfils the conditions established by the Commission at is forty-ninth and fifty-second sessions for the selection of the topics and based on the following criteria:

(a) The topic should reflect the needs for the States in respect of the progressive development and codification of international law;

(b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;

(c) The topic should be concrete and feasible for progressive development and codification;

(d) The Commission should not restrict itself to traditional topics, but it should also consider those that reflect new developments in international law and pressing concerns of the international community.[15]

30. The topic "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) in International Law" seems to reflect real needs for the States in respect of the progressive

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[15] See: *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), p. 291.

development and codification of international law. A developing practice, especially during last decades, of including the said obligation into numerous international treaties and its application by States in their mutual relations raises the question of unification of different aspects of operation of the obligation. Among most important problems which require a clarification without a delay is a possibility of recognizing the obligation in question not as a treaty based only but having also its roots, at least to some extent, in customary norms.

31. The topic appears to be sufficiently matured to permit progressive development and codification, especially in the light of developing State practice, its growing reflection in courts activities and numerous works of doctrine. A development and precise legal identification of the elements of the obligation to extradite or prosecute seem to be in the interest of States as one of the main positive factors for the development of the effectiveness of their cooperation in criminal matters.

32. The topic is precisely formulated and the concept of the said obligation is well established in international relations of States since ancient times. It is neither too general, nor too narrow, and its feasibility for progressive development and codification does not seem to be doubtful. As such, the obligation has been already put by the Commission on the list of topics suitable for future consideration.[16] Since then it has become obvious that this consideration should be started as soon as possible.

33. Although the obligation to extradite or prosecute may look, at first, as a very traditional one, we should not be misled, however, by its ancient, Latin formulation. The obligation itself cannot be treated as a traditional topic only. Its evolution from the period of Grotius up to recent times and its significant development as an effective tool against growing threats deriving for States and individuals from criminal offences can bring us easily to one conclusion - that it reflects new developments in international law and pressing concerns of the international community.

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[16] See: *Yearbook ... 1996*, vol. II, Part Two, p. 135.